

10-1-2008

Schmechel v. Dille Clerk's Record v. 6 Dckt. 35050

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SUPPLEMENTAL
RECORD VOLUME 3

Vol. 6 12

LAW CLERK

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

VAUGHN SCHEMECHEL, ETAL

Plaintiff/Appellant

and

VS.

CLINTON DILLE, ETAL

Defendant/Respondent

and

FIFTH

Appealed from the District Court of the
Judicial District for the State of Idaho, in and
TWIN FALLS
for _____ County

Hon. G. RICHARD BEVAN District Judge

DAVID COMSTOCK

X

Attorney for Appellant

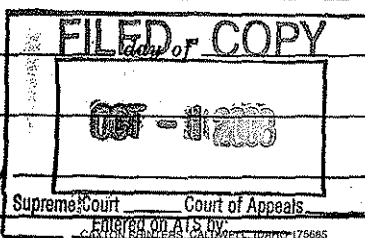
STEVEN HIPPLER

RICHARD HALL

Attorney X for Respondent

Filed this _____ day of _____, 20____

By



Clerk

Deputy

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

VAUGHN SCHMECHEL, individually and as)	
surviving spouse and Personal Representative)	CASE NO. CV 05-4345
of the Estate of Rosie Schmechel, deceased)	
and ROBERT P. LEWIS, KIM HOWARD)	
and TAMARA HALL, natural children of)	
ROSALIE SCHMECHEL, deceased,)	
)	
Plaintiffs/Appellants,)	
)	
vs)	
)	
CLINTON DILLE, M.D., SOUTHERN)	
IDAHO PAIN INSTITUTE, an Idaho)	
Corporation, THOMAS BYRNE, P. A.,)	
and JOHN DOE and JANE DOE, I through X,)	
)	
Defendants/Respondents.)	

CLERK'S SUPPLEMENTAL RECORD ON APPEAL
VOLUME 3

Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of Twin Falls

HONORABLE G. RICHARD BEVAN
District Judge

David Comstock
Byron Foster
199 N Capitol Blvd., Ste 500
P. O. Box 2774
Boise, ID 83701-2774

ATTORNEY FOR APPELLANT

Steven Hippler
J. Will Varin
601 W, Bannock Street
P. O. Box 2720
Boise, ID 83701-2720

ATTORNEY FOR RESPONDENT

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Filed October 23, 2007840

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Filed December 3, 20071071

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Date	Code	User	Judge
10/3/2005	NOAP	QUAM	Notice Of Appearance
		QUAM	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: Mick Hodges Receipt number: 5024920 Dated: 10/3/2005 Amount: \$82.00 (Check)
	COMP	QUAM	Complaint Filed
	SMIS	QUAM	Summons Issued x 3
		QUAM	Filing: I1A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Givens Pursley, LLP Receipt number: 5027934 Dated: 11/7/2005 Amount: \$52.00 (Check)
12/14/2005	ANSW	QUAM	Answer To Complaint And Demand For Jury Trial
	HRSC	COOPE	Hearing Scheduled (Scheduling Conference 01/04/2006 01:30 PM)
		COOPE	Order for Scheduling Conference and Order RE: Motion Practice
2/19/2005	LETT	COOPE	Letter from David Comstock
2/21/2005	HRVC	COOPE	Hearing result for Scheduling Conference held on 01/04/2006 01:30 PM: Hearing Vacated
2/30/2005	AFSV	NIELSEN	Affidavit Of Service
	SMRT	NIELSEN	Summons Returned
/5/2006		FERCH	Filing: I7A - Civil Answer Or Appear. All Other Actions No Prior Appearance Paid by: Hall Farley Oberrecht Blanton Receipt number: 6000440 Dated: 1/5/2006 Amount: \$52.00 (Check)
		FERCH	Notice Of Appearance
	ANSW	FERCH	Defendant Thomas J Byrne's Answer to plaintiffs complaint and demand for jury trial
/20/2006	SMRT	NIELSEN	Summons Returned Clinton Dille, M.D.
	SMRT	NIELSEN	Summons Returned Southern Idaho Pain Institute
/6/2006	NOSV	NIELSEN	Notice Of Service
/14/2006	HRSC	COOPE	Hearing Scheduled (Scheduling Conference 03/06/2006 01:30 PM)
/15/2006	OSCO	COOPE	Order for Scheduling Conference and Order RE: Motion Practice
/24/2006	NTSD	NIELSEN	Notice Of Service Of Discovery Documents
/2/2006	STIP	COOPE	Stipulation for Scheduling and Planning
/8/2006	HRVC	COOPE	Hearing result for Scheduling Conference held on 03/06/2006 01:30 PM: Hearing Vacated
	HRSC	COOPE	Hearing Scheduled (Jury Trial 10/16/2007 09:00 AM) Excluding Mondays
	HRSC	COOPE	Hearing Scheduled (Civil Pretrial Conference 09/24/2007 02:30 PM)

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
3/8/2006	HRSC	COOPE	Hearing Scheduled (Status/ADR 09/05/2007 01:32 PM)
3/9/2006	NOJT	COOPE	Notice Of Jury Trial Setting, Pretrial Conf- Rence And Order Governing Further Proceedings
4/3/2006	NOTR	NIELSEN	Notice Of Preparation Of Transcript
4/6/2006	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Defendant Clinton Dille, M.D.
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Thomas Byrne, PA
4/18/2006	NOSV	NIELSEN	Notice Of Service 04-17-06
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Amber Zaccone
5/1/2006	NOTC	RKLINE	Amended Notice Of Taking Video Deposition Duces Tecum Of Thomas Byrne, PA
	NOTC	RKLINE	Amended Notice Of Taking Video Deposition Duces Tecum Of Defendant Clinton Dille, M.D.
5/10/2006	NTSD	NIELSEN	Notice Of Service Of Discovery Documents
3/9/2006	NOTR	NIELSEN	Notice Of Preparation Of Transcript
	NOTR	NIELSEN	Notice Of Preparation Of Transcript
	NOTR	NIELSEN	Notice Of Preparation Of Transcript
3/19/2006	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum (Timothy Floyd, M.D.)
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum (Julian Nicholson, M.D.)
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum (Records Custodian-Sun Valley Spine Institute)
3/26/2006	NODT	NIELSEN	Amended Notice Of Deposition Duces Tecum (Julian Nicholson, M.D.)
	NODT	NIELSEN	Amended Notice Of Deposition Duces Tecum (Records Custodian - Sun Valley Spine Institute)
3/30/2006	NTSD	NIELSEN	Notice Of Service Of Discovery Documents
7/3/2006	SUBR	NIELSEN	Subpoena Returned
	AFSV	NIELSEN	Affidavit Of Service
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum (Records Custodian - Spine Institute of Idaho)
	SUBR	NIELSEN	Subpoena Returned
	AFFD	NIELSEN	Affidavit of Non-Service
7/13/2006	NOSV	MCMULLEN	Notice Of Service
7/14/2006	NOSV	NIELSEN	Notice Of Service
	NOSV	NIELSEN	Notice Of Service
7/17/2006	NTSD	NIELSEN	Notice Of Service Of Discovery Responses
	NTSD	NIELSEN	Notice Of Service Of Discovery Responses

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User		Judge
7/25/2006	SUBR	NIELSEN	Subpoena Returned	G. Richard Bevan
	AFFD	NIELSEN	Affidavit of Non-Service	G. Richard Bevan
9/8/2006	NTSD	NIELSEN	Notice Of Service Of Discovery Documents	G. Richard Bevan
9/29/2006	NOSV	NIELSEN	Notice Of Service	G. Richard Bevan
4/19/2007	MOTN	NIELSEN	Motion for Leave to Amend Complaint to Include Claim for Punitive Damages fax	G. Richard Bevan
4/20/2007	AFFD	NIELSEN	Supplemental Affidavit of Arthur G. Lipman, Pharm.D.	G. Richard Bevan
	AFFD	NIELSEN	Affidavit of Arthur G. Lipman, Pharm.d.	G. Richard Bevan
	MEMO	NIELSEN	Memorandum in Support of Plaintiffs' Motion for Leave to Amend Complaint to Include Claim for Punitive Damages	G. Richard Bevan
4/26/2007		NIELSEN	Plaintiffs' Expert Witness Disclosures	G. Richard Bevan
	HRSC	COOPE	Hearing Scheduled (Motion 06/18/2007 09:00 AM) to amend complaint to add punitive damages	G. Richard Bevan
	NOHG	NIELSEN	Notice Of Hearing Re: Motion for Leave to Amend Complaint to Include Claim for Punitive Damages	G. Richard Bevan
5/11/2007	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Kimberly Vorse, M.D.	G. Richard Bevan
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of David Verst, M.D.	G. Richard Bevan
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum \$of Juanita Peterson	G. Richard Bevan
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Carl Peterson	G. Richard Bevan
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Cindy Sheer	G. Richard Bevan
5/18/2007		NIELSEN	Defendant Thomas Byrne, P.A.'s Disclosure of Lay Witnesses	G. Richard Bevan
5/23/2007		NIELSEN	Plaintiffs' Lay Witness List fax	G. Richard Bevan
5/24/2007	NOSV	NIELSEN	Notice Of Service	G. Richard Bevan
	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Carl Peterson	G. Richard Bevan
	NOTC	NIELSEN	Notice of Vacating Deposition Duces Tecum of Juanita Peterson	G. Richard Bevan
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Kenneth Harris, M.D.	G. Richard Bevan
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Julian Nicholson, M.D.	G. Richard Bevan
	NODT	NIELSEN	amended Notice Of Taking Deposition Duces Tecum of Cindy Sheer	G. Richard Bevan

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Date	Code	User	Judge
5/24/2007	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Kent Jensen
5/25/2007		NIELSEN	DefendantThomasByrne,P.a.'sSupplemental Disclosure of Lay Witnesses fax
5/30/2007	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Kimberly Vorse, M.D. Fax
6/4/2007	AFFD	NIELSEN	Second Supplemental Affidavit of Arthur G. Lipman, Pharm.D.
	NOHG	NIELSEN	Notice Of Hearing
	AFFD	NIELSEN	Affidavit of Counsel in Support of Defendant Thomas Byrne's Motion to Strike Portions of the Affidavits of Arthur G. Lipman, Pharm. D.
	MOTN	NIELSEN	Defendant Thomas Byrne's Motion to Strike Portions of the Affidavits of Arthur G. Lipman, Pharm.D.
	AFFD	NIELSEN	Affidavit of Keri Fakata, Pharm.D
		NIELSEN	Defendant Thomas Byrne's Memorandum in Support of Motion to Strike Portions of the Affidavits of Arthur G. Lipman, Pharm.D.
6/6/2007		NIELSEN	Defendant Clinton Dille, M.D.'s Joinder in Motion to Strike Portions of the Affidavit of Arthur G. Lipman Pharm. D. fax
6/11/2007	AFFD	NIELSEN	Affidavit of Byron V. Foster
	AFFD	NIELSEN	Affidavit of Lorraine Shoafkadish BSN, RN
	MEMO	NIELSEN	Plaintiff's Memorandum in Opposition to Defendants' Motion to Strike Portions of the Affidavits of Arthur G. Lipman, Pharm.D.
	AFFD	NIELSEN	Affidavit of William Binegar, M.D. in Opposition to Plaintiffs' Motion to Amend Complaint to Add a Claim for Punitive Damages fax
		NIELSEN	Response to Plaintiffs' Motion for Leave to Amend Complaint to Include Claim for Punitive Damages fax
	AFFD	NIELSEN	Affidavit of Counsel in Support of Defendant Thomas Byrne, P.A.'s Memorandum in Opposition to Plaintiffs' Motion for Leave to Amend Complaint to Include Claim for Punitive Damages
	AFFD	NIELSEN	Affidavit of Rodde Cox, MD fax

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
6/11/2007		NIELSEN	Defendant Thomas Byrne, P.A.'s Memorandum in Opposition to Plaintiffs' Motion for Leave to Amend Complaint to Include Claim for Punitive Damages
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Stephen P. Lordon, M.D.
6/12/2007	AFFD	NIELSEN	Affidavit of Steven J. Hippler
	AFFD	NIELSEN	Affidavit of Bradford Hare, M.D.PH.D in Opposition to Plaintiffs' Motion to Amend Complaint to Add a Claim for Punitive Damages
6/13/2007	NOWD	NIELSEN	Notice Of Withdrawal of Plaintiff's Motion for Leave to Amend Complaint to Include Claim for Punitive Damages
6/14/2007	HRVC	COOPE	Hearing result for Motion held on 06/18/2007 09:00 AM: Hearing Vacated to amend complaint to add punitive damages motion to strike portions of affidavits of Arthur Lipman
	NOTC	NIELSEN	Notice of Vacating Deposition Duces Tecum of Carl Peterson fax
6/15/2007	NOTC	NIELSEN	Notice Vacating Hearing fax
	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Cindy Scheer fax
	NOTC	COOPE	Notice Vacating Hearing fax
6/18/2007		NIELSEN	Plaintiffs' First Supplemental Expert Witness Disclosures
		NIELSEN	Defendant Thomas J. Byrne's Disclosure of Expert Witnesses
	NOTC	NIELSEN	Notice of Compliance fax
	NOTC	COOPE	Notice of Vacating Hearing
6/19/2007	NTSD	NIELSEN	Notice Of Service Of Discovery Documents
6/25/2007	SUBR	NIELSEN	Subpoena Returned fax
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Dennis Chambers fax
	RETN	NIELSEN	Return Of Service 6-16-7 fax
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum fax

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
6/27/2007	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Arthur G. Lipman, Pharm. D. fax
	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Stephen P. Lordon, M.D. fax
	NODT	NIELSEN	Second Amended Notice Of Taking Deposition Duces Tecum of Kimberly Vorse, M.D. fax
7/3/2007	MOTN	NIELSEN	Motion for Protective Order fax
7/20/2007	SUBR	NIELSEN	Subpoena Returned
7/23/2007	NOTR	NIELSEN	Notice Of Preparation Of Transcript & Filing
	NOTR	NIELSEN	Notice Of Preparation Of Transcript & Filing
	NOTR	NIELSEN	Notice Of Preparation Of Transcript & Filing
	NOTR	NIELSEN	Notice Of Preparation Of Transcript & Filing
8/2/2007	NTSD	NIELSEN	Notice Of Service Of Discovery Documents
8/3/2007	NTSD	NIELSEN	Notice Of Service Of Discovery Documents
	NTSD	NIELSEN	Notice Of Service Of Discovery Documents
8/6/2007	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Cornelius Hofman
	NOTC	NIELSEN	Notice of Vacating Deposition Duces Tecum of Dennis Chambers
	NOTC	NIELSEN	Notice of Vacating Deposition Duces Tecum of Shaiyerne Shindle
	NOSV	NIELSEN	Notice Of Service
	NOSV	NIELSEN	Notice Of Service
8/13/2007	NODT	NIELSEN	Second Amended Notice Of Taking Deposition Duces Tecum of Stephen P. Lordon, M.D. (Change of Location)
	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Jim Keller, M.P.H., PA-C
	NODT	NIELSEN	Second Amended Notice Of Taking Deposition Duces Tecum of Arthur G. Lipman, Pharm. D.
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Glen R. Groben
	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Glen R. Groben
	NODT	NIELSEN	Second Amended Notice Of Taking Deposition Duces Tecum of Glen R. Groben
	NOTR	NIELSEN	Notice Of Preparation Of Transcript & Filing
8/22/2007	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Dennis Chambers fax

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
8/22/2007	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Christopher Frey fax G. Richard Bevan
	NODT	NIELSEN	Amended Notice Of Taking Deposition Duces Tecum of Shaiyenne Shindle fax G. Richard Bevan
8/27/2007	NTSD	NIELSEN	Notice Of Service Of Discovery Documents G. Richard Bevan
8/29/2007	CONT	COOPE	Continued (Status/ADR 09/10/2007 11:00 AM) by phone with plaintiff's counsel to initiate G. Richard Bevan
		COOPE	Notice Of Hearing G. Richard Bevan
	NOSV	NIELSEN	Notice Of Service G. Richard Bevan
8/30/2007	NTSD	NIELSEN	Notice Of Service Of Discovery Responses G. Richard Bevan
9/10/2007		NIELSEN	Plaintiffs' Second Supplemental Expert Witness Disclosures G. Richard Bevan
	HRHD	COOPE	Hearing result for Status/ADR held on 09/10/2007 11:00 AM: Hearing Held by phone with plaintiff's counsel to initiate G. Richard Bevan
	LETT	COOPE	Letter from Byron Foster G. Richard Bevan
	CMIN	COOPE	Court Minutes Hearing type: Status/ADR Hearing date: 9/10/2007 Time: 11:03 am Court reporter: Virginia Bailey G. Richard Bevan
9/11/2007	NOTR	NIELSEN	Notice Of Preparation Of Transcript & Filing G. Richard Bevan
		NIELSEN	Plaintiffs' Third Supplemental Expert Witness Disclosures fax G. Richard Bevan
9/12/2007	NTSD	NIELSEN	Notice Of Service Of Discovery Documents G. Richard Bevan
	NTSD	NIELSEN	Notice Of Service Of Discovery Documents G. Richard Bevan
	NOSV	NIELSEN	Notice Of Service fax G. Richard Bevan
	NOSV	NIELSEN	Notice Of Service fax G. Richard Bevan
	NOSV	NIELSEN	Notice Of Service fax G. Richard Bevan
9/14/2007	NOSV	NIELSEN	Notice Of Service G. Richard Bevan
9/17/2007	NTSD	NIELSEN	Notice Of Service Of Discovery Documents G. Richard Bevan
9/24/2007	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Marty Bright fax G. Richard Bevan
	NODT	NIELSEN	Notice Of Taking Deposition Duces Tecum of Valerie Bothoff fax G. Richard Bevan

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
9/24/2007	NODT	NIELSEN	Second Amended Notice Of Taking Deposition Duces Tecum of Christopher Frey fax
	HRHD	COOPE	Hearing result for Civil Pretrial Conference held on 09/24/2007 02:30 PM: Hearing Held in Chambers
		NIELSEN	Defendant Thomas Byrne, P.A.'s Exhibit List fax
	MISC	COOPE	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute Trial Exhibit List
	MISC	COOPE	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Trial Witness List
9/25/2007	ORDR	COOPE	Pretrial Conference Order Pursuant to I.R.C.P. 16(d)
9/26/2007	MOTN	NIELSEN	Plaintiffs' Motion in Limine fax
	MEMO	NIELSEN	Memorandum in Support of Plaintiffs' Motion in Limine fax
	WITN	NIELSEN	Defendant Thomas Byrne, P.A.'s Witness List fax
	WITN	NIELSEN	Plaintiffs' Witness List fax
		NIELSEN	Plaintiffs' Exhibit List fax
9/27/2007	AFFD	NIELSEN	Affidavit of Counsel in Support of Defendant Thomas Byrne, P.A.'s Motion in Limine Re: Various Issues
9/28/2007	MOTN	NIELSEN	Defendant Clinton Dille, M.D. and Southern Idaho Pain Institutes' Motions in Limine fax
10/1/2007	MEMO	NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institutes' Memorandum in Support of Motions in Limine
	MEMO	NIELSEN	Memorandum in Support of Thomas J. Byrne's Motion in Limine Re: Various Issues
	AFFD	NIELSEN	Affidavit of J. Will Varin in Support of Clinton Dille and the Southern Idaho Pain Institute's Motions in Limine
	NOSV	NIELSEN	Notice Of Service fax
10/2/2007	HRSC	COOPE	Hearing Scheduled (Motion 10/11/2007 10:00 AM) Pretrial
10/3/2007	AFFD	NIELSEN	Affidavit of Counsel in Support of Defendant Thomas Byrne's Motion to Quash Subpoenas Duces Tecum fax

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
10/3/2007	MEMO	NIELSEN	Defendant's Memorandum in Support of Motion to Quash Subpoenas Duces Tecum fax
	MOTN	NIELSEN	Defendant's Motion to Quash Subpoenas Duces Tecum fax
10/4/2007	MOTN	NIELSEN	Defendant's Motion to Shorten Time fax
	NOHG	NIELSEN	Notice Of Hearing fax
		NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Response to Plaintiffs' Motion in Limine fax
	AFFD	NIELSEN	Affidavit of Counsel in Support of Defendant Thomas Byrne's Memorandum in Opposition to Plaintiffs' Motion in Limine fax
	MEMO	NIELSEN	Defendant Thomas J. Byrne's Memorandum in Opposition to Plaintiffs' Motion in Limine fax
	MOTN	NIELSEN	Defendant Thomas Byrne, P.A.'s Joinder in Clinton Dille, M.D. and Southern Idaho Pain Institute's Motion in Limine fax
		NIELSEN	Amended Plaintiffs' Exhibit List fax
10/5/2007	MEMO	NIELSEN	Memorandum in Response to Defendant's Motions in Limine
	MEMO	NIELSEN	Memorandum in Opposition to Defendant's Motion to Quash Subpoenas Duces Tecum
	AFFD	NIELSEN	Affidavit of Byron V. Foster
	AFFD	NIELSEN	Affidavit of J. Will Varin in Support of Clinton Dille' and the Southern Idaho Pain Institute's Response to Plaintiffs' Motion in Limine
		NIELSEN	Defendant Thomas J. Byrne's Supplemental Disclosure of Expert Witnesses fax
		NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Joinder in Defendant Byrne's Motion to Quash and Response to Plaintiffs' Opposition to Motion to Quash fax
		NIELSEN	Plaintiffs' Fourth Supplemental Expert Witness Disclosure fax
	SUBR	NIELSEN	Subpoena Returned
	AFSV	NIELSEN	Affidavit Of Service

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
10/9/2007	HRSC	COOPE	Hearing Scheduled (Hearing Scheduled 10/11/2007 09:30 AM)
	MEMO	NIELSEN	Pretrial Memorandum
	AFFD	NIELSEN	Affidavit of Byron V. Foster in Support of Plaintiffs' Pretrial Memorandum
	MEMO	NIELSEN	Reply Memorandum in Support of Plaintiffs' Motion in Limine
		NIELSEN	Plaintiff's Proposed Jury Instructions
		NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Reply to Plaintiffs' Response to Defendants' Motions in Limine
	NIELSEN	NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Joinder in Defendant Byrne's Motion in Limine
		NIELSEN	Defendant Thomas J. Byrne, P.A.'s Proposed Spcial Verdict Form
		NIELSEN	Defendant Thomas J. Byrne's Trial Brief
	NIELSEN	NIELSEN	Defendant Thomas J. Byrne, P.A.'s Proposed Jury Instructions
10/10/2007	RSPN	COOPE	Defendant's Thomas Bryne, P.A.'s Joinder in Clinton Dille, M.D. and Southern Idaho Pain Institute's Reply to Plaintiff's Reponse to Defendants' Motions in Limine
		NIELSEN	Defendants' Joint Exhibit List fax
		NIELSEN	Defendant Clinton Dille' M.D. and Southern Idaho Pain Institute's Trial Brief
		NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Jury Instructions
10/11/2007	CMIN	COOPE	Court Minutes Hearing type: Motion in Limines Hearing date: 10/11/2007 Time: 10:07 am Court reporter: Virginia Bailey
	CMIN	COOPE	Court Minutes Hearing type: Jury Numbering Hearing date: 10/11/2007 Time: 9:42 am Court reporter: Virginia Bailey
	NOSV	NIELSEN	Notice Of Service fax
	MISC	COOPE	Jury Seating Chart
	MISC	COOPE	Jury Seating Chart (Hand written)
	HRHD	COOPE	Hearing result for Hearing Scheduled held on 10/11/2007 09:30 AM: Hearing Held
	HRHD	COOPE	Hearing result for Motion held on 10/11/2007 10:00 AM: Hearing Held Pretrial
	JTST	COOPE	Hearing result for Jury Trial held on 10/16/2007 09:00 AM: Jury Trial Started Excluding Mondays

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
10/12/2007		NIELSEN	Pocket Trial Brief Re: Hearsay Issue and Mrs. Schmechel's Identification of Mr. Byrne fax
		NIELSEN	Supplemental Trial Memorandum Re: Dr. Lipman fax
		NIELSEN	Second Supplemental Trial Memorandum Re: Plaintiffs' Expert Jim Keller fax
10/15/2007	AFFD	NIELSEN	Affidavit of Chris D. Comstock Regarding the Parties' Motions in Limine
		NIELSEN	Pocket Trial Brief Re: Hearsay Issue and Mrs. Schmechel's Identification of Mr. Byrne
	MEMO	NIELSEN	Supplemental Trial Memorandum Re: Dr. Lipman
		NIELSEN	Second Supplemental Trial Memorandum Re: Plaintiffs' Expert Jim Keller
		NIELSEN	Defendant Thomas J. Byrne's Reply to Plaintiffs' Pocket Trial Brief Re: Hearsay Issue and Mrs. Schmechel's Identification of Mr. Byrne fax
	JUIN	COOPE	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's First Supplement Jury Instructions
10/16/2007	CMIN	COOPE	Court Minutes Hearing type: Jury Trial Day 1 Hearing date: 10/16/2007 Time: 9:18 am Court reporter: Virginia Bailey
	MISC	COOPE	Juror Questions Submitted by Defendants Dille and Southern Idaho Pain Institute (in envelope with answers)
	MISC	COOPE	Jury Roll Call
	MISC	COOPE	Peremptory Challenges
	MISC	COOPE	Potential Jury Panel
	ORDR	COOPE	Order Re: Motions in Limine
10/17/2007	CMIN	COOPE	Court Minutes Hearing type: Jury Trial Day 2 Hearing date: 10/17/2007 Time: 8:45 am Court reporter: Virginia Bailey
	MISC	COOPE	Preliminary Jury Instructions
	MISC	COOPE	Final Jury Panel
10/18/2007	CMIN	COOPE	Court Minutes Hearing type: Jury Trial Day 3 Hearing date: 10/18/2007 Time: 9:09 am Court reporter: Virginia Bailey Audio tape number: ct rm 1
	JUIN	COOPE	Plaintiff's First Supplemental Proposed Jury Instructions Filed
10/19/2007	CMIN	COOPE	Court Minutes Hearing type: Jury Trial Day 4 Hearing date: 10/16/2007 Time: 9:00 am Court reporter: Virginia Bailey

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
10/19/2007	BREF	COOPE	Plaintiffs' Bench Brief RE: Proposed "Reckless" Instruction
	OBJC	COOPE	Plaintiffs' Objections to the Defendant's Proposed Jury Instructions
10/23/2007	CMIN	COOPE	Court Minutes Hearing type: Jury Trial Day 5 Hearing date: 10/23/2007 Time: 9:00 am Court reporter: Virginia Bailey
	BREF	COOPE	Supplemental Bench Brief Regarding Jury Instruction on Reckless Conduct
10/24/2007	CMIN	COOPE	Court Minutes Hearing type: Jury Trial Hearing date: 10/24/2007 Time: 9:00 am Court reporter: Virginia Bailey
10/25/2007	CMIN	COOPE	Court Minutes Hearing type: Jury Trial Day 7 Hearing date: 10/25/2007 Time: 9:10 am Court reporter: Virginia Bailey
	NOTR	NIELSEN	Notice Of Preparation Of Transcript & Filing
	NOTR	NIELSEN	Notice Of Preparation Of Transcript & Filing
10/26/2007	CMIN	COOPE	Court Minutes Hearing type: Jury Trial Day 8 Hearing date: 10/26/2007 Time: 9:10 am Court reporter: Virginia Bailey
	JUIN	COOPE	Plaintiffs' Second Supplemental Proposed Jury Instructions Filed
	OBJC	COOPE	Defendants' Joint Objections to Plaintiffs' Proposed Jury Instructions
10/30/2007	CMIN	COOPE	Court Minutes Hearing type: Jury Trial Day 9 Hearing date: 10/30/2007 Time: 8:47 am Court reporter: Virginia Bailey
	MISC	COOPE	Final Jury Instructions
	OBJC	COOPE	Defendants' Joint Objections to Court's Proposed Final Jury Instructions
	OBJC	COOPE	Defendants' Objectionto Plaintiffs' Proposed Rebuttal Testimony of Dr. Lipman
	MISC	COOPE	Declaration of Counsel in Support of Defendants' Objection to Proposed Rebuttal Testimony of Dr. Lipman
	MISC	COOPE	Special Verdict Form
10/31/2007	LETT	COOPE	Letter from Comstock and Bush
11/5/2007	JDMT	COOPE	Judgment
11/9/2007	JDMT	COOPE	Judgment
	CDIS	COOPE	Civil Disposition/Judgment entered: entered for: Byrne, Thomas J PA, Defendant; Dille, Clinton L MD, Defendant; Doe, John, Defendant; Jane Doe I -x,, Defendant; Southern Idaho Pain Institute, Defendant; Hall, Tamara, Plaintiff; Howard, Kim Lee, Plaintiff; Lewis, Robert P, Plaintiff; Schmechel, Vaughn, Plaintiff. Filing date: 11/9/2007

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
11/14/2007	AFFD	NIELSEN	Affidavit of Counsel in Support of Memorandum of Costs
	MOTN	NIELSEN	Defendant Thomas Byrne, P.A.'s Motion for Costs
	MEMO	NIELSEN	Defendant Thomas J. Byrne's Verified Memorandum of Costs
11/19/2007	MOTN	NIELSEN	Plaintiffs' Motion for New Trial
	MEMO	NIELSEN	Memorandum in Support of Plaintiffs' Motion for New Trial
	AFFD	NIELSEN	Affidavit of Byron V. Foster in Support of Plaintiffs' Motion for New Trial
11/20/2007	HRSC	COOPE	Hearing Scheduled (Motion for Attorney fees and Costs 12/17/2007 09:00 AM)
	HRSC	COOPE	Hearing Scheduled (Motion 12/17/2007 09:00 AM) for new trial -- Comstock
11/21/2007	NOHG	NIELSEN	Notice Of Hearing re: Motion for New Trial fax
	ORDR	COOPE	Order Returning Property to Investigating Law Enforcement Agency
11/23/2007	MOTN	NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Motion for Costs
	MEMO	NIELSEN	Verified Memorandum of Costs
11/26/2007		NIELSEN	Defendant Thomas J. Byrne's Amended Verified Memorandum of Costs
	NOHG	NIELSEN	Notice Of Hearing fax
11/28/2007	OBJC	NIELSEN	Plaintiffs' Objections to Defendant Thomas J. Byrne's Verified Memorandum of Costs
11/30/2007	NOHG	NIELSEN	Notice Of Hearing
12/3/2007		NIELSEN	Defendant Thomas J. Byrne's Memorandum in Opposition to Plaintiffs' Motion for New Trial
	AFFD	NIELSEN	Affidavit Keely E. Duke in Support of Thomas J. Byrne's Memorandum in Opposition to Plaintiffs' Motion for New Trial
		NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Response to Plaintiffs' Motion for New Trial
	AFFD	NIELSEN	Affidavit of Steven J. Hippler in Support of Clinton Dille and the Southern Idaho Pain Institute's Response to Plaintiffs' Motion for New Trial
	OBJC	NIELSEN	Plaintiffs' Objections to Defendant Clinton Dille, M.D. and Southern Idaho Pain Institute's Verified Memorandum of Costs fax
12/13/2007		NIELSEN	Defendant Thomas J. Byrne's Reply Memorandum in Support of Motion for Costs

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
12/13/2007	MEMO	NIELSEN	Reply Memorandum in Support of Plaintiffs' Motion for New Trial G. Richard Bevan
12/14/2007	AFFD	NIELSEN	Affidavit of J. Will Varin in Support of Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Reply to Plaintiffs' Objections to Defendants Verified Memorandum of Costs G. Richard Bevan
	MEMO	NIELSEN	Amended Verified Memorandum of Costs G. Richard Bevan
		NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Reply to Plaintiffs' Objections to Defendants Verified Memorandum of Costs G. Richard Bevan
12/17/2007	CMIN	COOPE	Court Minutes Hearing type: Motion for New trial and motion for atty fees Hearing date: 12/17/2007 Time: 9:00 am Court reporter: Virginia Bailey G. Richard Bevan
	HRHD	COOPE	Hearing result for Motion held on 12/17/2007 09:00 AM: Hearing Held for new trial -- Comstock G. Richard Bevan
	HRHD	COOPE	Hearing result for Motion for Attorney fees and Costs held on 12/17/2007 09:00 AM: Hearing Held Dille and Bryne G. Richard Bevan
1/23/2008	OPIN	COOPE	Memorandum Opinion and Order RE: Plaintiffs' Motion for New Trial G. Richard Bevan
1/24/2008	OPIN	COOPE	Memorandum Decision and Order RE: Defendants' Motions for Costs G. Richard Bevan
2/14/2008	JDMT	COOPE	Amended Judgment G. Richard Bevan
	JDMT	COOPE	Judgment Nunc Pro Tunc G. Richard Bevan
3/3/2008	MISC	COOPE	Estimate Cost of Reporter's Transcript 2100 pages G. Richard Bevan
3/5/2008	NTOA	COOPE	Notice Of Appeal G. Richard Bevan
	CCOA	COOPE	Clerk's Certificate Of Appeal G. Richard Bevan
		COOPE	Filing: T - Civil Appeals To The Supreme Court (\$86.00 Directly to Supreme Court Plus this amount to the District Court) Paid by: Comstock, David E. (attorney for Schmechel, Vaughn) Receipt number: 8006054 Dated: 3/5/2008 Amount: \$15.00 (Check) For: Schmechel, Vaughn (plaintiff) G. Richard Bevan
		COOPE	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: Comstock and Bush Receipt number: 8006055 Dated: 3/5/2008 Amount: \$70.00 (Check) G. Richard Bevan
		COOPE	Miscellaneous Payment: Record Covers For Appeals Paid by: Comstock and Bush Receipt number: 8006055 Dated: 3/5/2008 Amount: \$30.00 (Check) G. Richard Bevan
3/14/2008	SCDF	COOPE	Supreme Court Document Filed- Copy of Filing Fee Receipt G. Richard Bevan

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
3/14/2008	SCDF	COOPE	Supreme Court Document Filed- Filing of Clerk's Certificate
	SCDF	COOPE	Supreme Court Document Filed- Notice of Appeal (T)
3/17/2008	REQU	COOPE	Defendant Thomas J. Bryne, P.A.'s Request for Additional Transcript and Record
	REQU	COOPE	Defendants Clinton Dille M.D. and Southern Idaho Pain Institute's Request for Additional Transcripts and Records
3/18/2008	CCOA	COOPE	Amended Clerk's Certificate Of Appeal
3/24/2008	SCDF	COOPE	Supreme Court Document Filed- Order Granting Court Reporter's Motion for Extension of Time
	SCDF	COOPE	Supreme Court Document Filed- Clerk's Record & Transcript Due Date Reset
3/28/2008	SCDF	COOPE	Supreme Court Document Filed- Document(s)
4/2/2008	AFFD	NIELSEN	Affidavit of Byron W. Foster fax
	MOTN	NIELSEN	Plaintiff's Motion to Extend Automatic Stay fax
	AFFD	NIELSEN	Affidavit of Taylor L. Mossman fax
4/8/2008		NIELSEN	Defendants Clinton Dille', M.D. and Southern Idaho Pain Institute's Objection to Plaintiffs' Motion to Extend Automatic Stay fax
	AFFD	NIELSEN	Affidavit of Steven J. Hippler in Support of Defendants' Objection to Plaintiffs' Motion to Extend Automatic Stay fax
4/9/2008		COOPE	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: Givens Pursley Receipt number: 8009231 Dated: 4/9/2008 Amount: \$100.00 (Check)
5/8/2008	HRSC	COOPE	Hearing Scheduled (Motion 05/28/2008 02:00 PM) to stay execution and bond in interesting bearing acct., by phone
	NOTC	COOPE	Plaintiff's Notice of Posting of Cash Bond
	MOTN	COOPE	Plaintiff's Motion to Stay Execution of Judgment Pending the Appeal
	BNDC	COOPE	Bond Posted - Cash (Receipt 8011835 Dated 5/8/2008 for 35603.64)
5/12/2008	OBJC	NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Objection to Plaintiffs' Motion to Stay Execution of Judgment Pending the Appeal
	NOHG	COOPE	Notice Of Telephonic Hearing RE: Plaintiffs' Motion to Stay Execution of Judgment Pending the Appeal and Notice of Posting Cash Bond

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
5/21/2008		NIELSEN	Thomas Byrne, P.A.'s Joinder in Defendants Clinton Dille, M.D. and Souther Idaho Pain Institute's Objection to Plaintiffs' Motion to Stay Execution of Judgment Pending the Appeal fax
5/28/2008	CMIN	COOPE	Court Minutes Hearing type: Motion Hearing date: 5/28/2008 Time: 10:00 am Court reporter: Virginia Bailey Audio tape number: ct rm 1
	DCHH	COOPE	Hearing result for Motion held on 05/28/2008 02:00 PM: District Court Hearing Held Court Reporter: Number of Transcript Pages for this hearing estimated: to stay execution and bond in interest bearing acct., by phone
5/30/2008	ORDR	COOPE	Order Granting Plaintiffs' Motion to Stay Execution of Judgment Pending the Appeal
6/9/2008	SCDF	COOPE	Supreme Court Document Filed- Document
	SCDF	COOPE	Supreme Court Document Filed- Clerk's Record and Transcript Due Date Reset
	SCDF	COOPE	Supreme Court Document Filed- Order Granting Court Reporter's Motion for Extension of Time
	SCDF	COOPE	Supreme Court Document Filed- Clerk's Record & Transcript Due Date Reset
6/13/2008	NOTC	COOPE	Notice of Balance Due on Clerk's Record
	NOTC	COOPE	Notice of Balance Due on Clerk's Record
	NOTC	COOPE	Notice of Balance Due on Clerk's Record
6/24/2008		COOPE	Miscellaneous Payment: Personal Copy Fee Paid by: Comstaock and Bush Receipt number: 8016131 Dated: 6/24/2008 Amount: \$61.70 (Check)
		COOPE	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: Comstaock and Bush Receipt number: 8016131 Dated: 6/24/2008 Amount: \$291.25 (Check)
		COOPE	Miscellaneous Payment: Record Covers For Appeals Paid by: Comstaock and Bush Receipt number: 8016131 Dated: 6/24/2008 Amount: \$30.00 (Check)
		COOPE	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: Hall, Farley, Oberrecht & Blanton P.A. Receipt number: 8016139 Dated: 6/24/2008 Amount: \$269.00 (Check)
		COOPE	Miscellaneous Payment: Personal Copy Fee Paid by: Hall, Farley, Oberrecht & Blanton P.A. Receipt number: 8016140 Dated: 6/24/2008 Amount: \$6.90 (Check)

Vaughn Schmechel, Robert P Lewis, Kim Lee Howard, Tamara Hall vs. Clinton L Dille MD, Southern Idaho Pain Institute, Thomas J Byrne PA, John Doe, Jane Doe I -x

Date	Code	User	Judge
6/24/2008		COOPE	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: Hall, Farley, Oberrecht & Blanton P.A. Receipt number: 8016140 Dated: 6/24/2008 Amount: \$47.50 (Check)
		COOPE	Miscellaneous Payment: Personal Copy Fee Paid by: Givens Pursley Receipt number: 8016141 Dated: 6/24/2008 Amount: \$62.00 (Check)
		COOPE	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: Givens Pursley Receipt number: 8016141 Dated: 6/24/2008 Amount: \$211.25 (Check)
7/8/2008	LODG	COOPE	Lodged Transcript Volume 1
	LODG	COOPE	Lodged Transcript Volume 2
7/11/2008	SCDF	COOPE	Supreme Court Document Filed- Notice of Transcript Lodged
8/5/2008	OBJC	NIELSEN	Defendants Clinton Dille, M.D. and Southern Idaho Pain Institute's Objection to Clerk's Record and Request for Additional Items
	OBJC	NIELSEN	Defendant Thomas J. Byrne's Joinder in Defendants Clinton Dille M.D. and Southern Idaho Pain Institute's Objection to Clerk's Record and Request for Additional Items
8/6/2008	HRSC	COOPE	Hearing Scheduled (Motion 09/03/2008 09:00 AM) Objection to clerk's record
8/7/2008	NOHG	NIELSEN	Notice Of Hearing
8/12/2008	SCDF	COOPE	Supreme Court Document Filed- Document (s)
	SCDF	COOPE	Supreme Court Document Filed- Clerk's Record/Reporter's Trans. -Suspended-
8/22/2008	STIP	NIELSEN	Stipulation re: to Clerk's Record and Request for Additional Items
	ORDR	COOPE	Order RE: Objection to Clerk's Record and Request for Additional Items and Stipulation RE: Objection to Clerk's Record and Request for Additional Items
8/27/2008	HRVC	COOPE	Hearing result for Motion held on 09/03/2008 09:00 AM: Hearing Vacated Objection to clerk's record
	NOTC	COOPE	Notice of Balance due on Clerk's Record (Supplemental)
9/2/2008	SCDF	COOPE	Supreme Court Document Filed- Document(s)
	SCDF	COOPE	Supreme Court Document Filed- Clerk's Record and Transcript Due Date Reset

ORIGINAL

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ISB #: 2760

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

VAUGHN SCHMECHEL, individually, and as Surviving Spouse and Personal Representative of the Estate of ROSALIE SCHMECHEL, deceased, and ROBERT P LEWIS, KIM HOWARD and TAMARA HALL, natural children of ROSALIE SCHMECHEL, deceased,

Plaintiffs,

vs.

CLINTON DILLE, M.D., SOUTHERN
IDAHO PAIN INSTITUTE, an Idaho
corporation, THOMAS BYRNE, P.A., and
JOHN DOE and JANE DOE, I through X,

Defendants.

DISTRICT COURT
TWIN FALLS CO., IDAHO
FILED

2007 OCT -9 AM 10:52

BY M CLERK

-DEPUTY

Case No. CV 05-4345

AFFIDAVIT OF BYRON V. FOSTER IN
SUPPORT OF PLAINTIFFS' PRETRIAL
MEMORANDUM

CERTIFICATE OF SERVICE

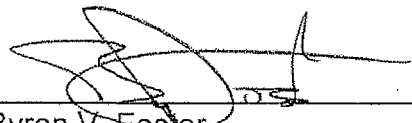
I hereby certify that on the 9 day of October, 2007, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

Steven J. Hippler
GIVENS PURSLEY, LLP
601 W. Bannock St.
PO Box 2720
Boise, ID 83701-2720
*Attorneys for Clinton Dille, M.D.
and Southern Idaho Pain Institute*

☐ U.S. Mail
☒ Hand Delivery
☐ Facsimile (208) 388-1300

Richard E. Hall
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BLANTON, PA
702 West Idaho, Suite 700
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Boise ID 83701
Attorneys for Thomas Byrne, PA

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Byron V. Foster

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ISB # 2455

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

VAUGHN SCHMECHEL, individually,
and as Surviving Spouse and Personal
Representative of the Estate of
ROSALIE SCHMECHEL, deceased,
and ROBERT P LEWIS, KIM HOWARD
and TAMARA HALL, natural children of
ROSALIE SCHMECHEL, deceased,

Plaintiffs,

vs.

CLINTON DILLE, M.D., SOUTHERN
IDAHO PAIN INSTITUTE, an Idaho
corporation, THOMAS BYRNE, P.A.,
and JOHN DOE and JANE DOE, I
through X,

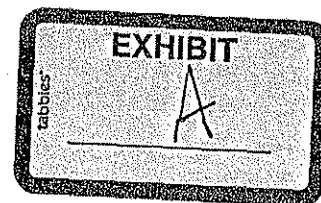
Defendants.

Case No. CV-05-4345

AFFIDAVIT OF LORRAINE SHOAF-
KADISH, B.S.N., R.N.

STATE OF UTAH)
: ss.
County of _____)

AFFIDAVIT OF LORRAINE SHOAF-KADISH, B.S.N., R.N. - 1



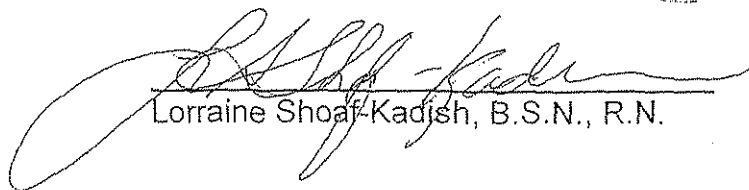
I, LORRAINE SHOAF-KADISH, B.S.N, R.N., being first duly sworn upon oath, depose and state:

1. That I make this Affidavit based upon my own personal knowledge;
2. That I am a registered nurse, with a Bachelors Degree in the Science of Nursing and am the owner of Shoaf & Associates, Inc., Legal Nurse Consultants of Salt Lake City, Utah;
3. That I was contacted by Byron V. Foster, one of the attorneys representing Vaughn Schmechel in the above-captioned case;
4. That Mr. Foster requested that I assist him in locating an anesthesiology/pain management physician in the State of Idaho who would be willing to speak with Stephen Lordon, M.D. and Arthur Lipman, Pharm.D., two of Plaintiff's expert witnesses, regarding the standard of care applicable to the Defendants. In conjunction with that request, Mr. Foster supplied me with a list of anesthesiology/pain management physicians in the State of Idaho, attached hereto as Exhibit A;
5. That attached hereto as Exhibit B is a copy of a cover letter I faxed to each of the anesthesiology/pain management physicians listed on Exhibit A.
6. That attached hereto as Exhibit C, is a log entitled Anesthesiology Qualifying Expert Log – Vaughn Schmechel, which indicates the anesthesiology/pain management physicians whom I contacted and their response to my request that they speak with Stephen Lordon, M.D. and Arthur Lipman, Pharm.D. regarding the standard of care applicable to the Defendants;
7. That the attached log is a fair and accurate depiction of the responses I received as a result of contacting the listed anesthesiology/pain management

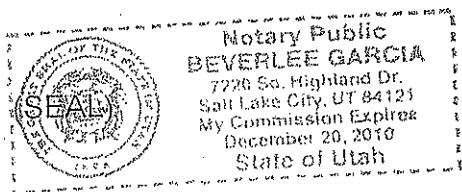
physicians;

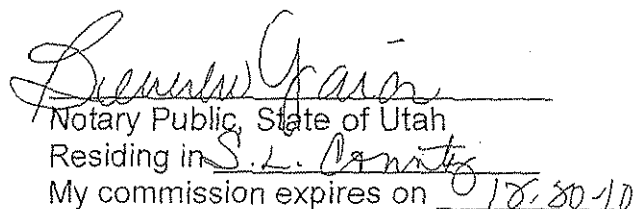
8. That I contacted Craig Flinders, M.D., an anesthesiology/pain management physician in Lewiston, Idaho, and he agreed to speak with plaintiff's experts regarding the applicable standard of care.

FURTHER YOUR AFFIANT SAITH NAUGHT.


Lorraine Shoaf-Kadish, B.S.N., R.N.

SUBSCRIBED AND SWORN TO before me this 7th day of May, 2007.




Notary Public, State of Utah
Residing in S.L. County
My commission expires on 12-20-10

Schmechel

PA qualifying expert call list

Date of Injury: 10/02/03

Last updated: April 19, 2006

William Bineger, MD 301 W. Myrtle Boise, ID 83702 208-342-8200 or 208-345-6388 fax: 208-342-8202	04/11/06-1328- approval to talk with a PA has to go through Dr. Bineger first. Left my name and number. 1438-spoke with Teresa, explained need. She requested a fax, so faxed letter. PA is Nicole Lenzi. faxed memo to her at 1523.		04/11/06-1730-read fax, saying no, not interested. 04/13/02-read fax from Nicole, not interested.
Clinton Mallari, MD Boise, ID 208-342-4700	04/11/06-1332- does not utilize any PA's		
St. Alphonsus Pam Man. Ctr. Sandra Thompson, MD 901 N. Curtis Rd # 204 Boise, ID 83706 208-367-4343	04/11/06-1333- does not employ any PA's		
Idaho State University 208-373-1700	04/11/06-1443- spoke with Paula Phelps. Gave me a name of T. J. Byrne.		

T.J. Byrne Southern Idaho Pain Clinic 236 Martin St. Twin Falls, ID 83301 208-733-3194	04/11/06-01453- called but no answer. No longer works at southern Idaho Pain Clinic. 04/11/06-1741-NA 04/11/06- 2100-NA. Checked anywho.com, got a number- 208-634- 3186-LM. 04/12/06-0815- LM again.		DO NOT CALL-IS DEFENDANT PER BYRON
Dr. Dille Southern Idaho Pain Clinic 236 Martin St. Twin Falls, ID 83301 208-733-3181	04/11/06- 1516- called, the PA is John Urruna, left a message for him, out till tomorrow am.		DO NOT CALL-IS DEFENDANT PER BYRON
Alan S. Nelson, DO 1344 Hilland Ave. #D Burley, ID 83318 208-878-8817	04/11/06- 1509- called, no PA's		
Richard Radnovich, DO 4850 N. Rosepoint Way, # 100 Boise, ID 208-939-2100	04/11/06- 1521- called, spoke with Patty, no PA's		
(208) 726-0000 Sun Valley Pain & Sleep Center 380 N Washington Ave Ketchum, ID 83340	04/11/06-1524- called, no PA's		
Idaho Medical Association 208-344-7888 www.IDMed.org	04/12/06-looked up names of physician's and PA's licensed in Idaho.		

<p>Interventional Pain Consultants PA-Mark Ackerman Lewiston, ID 208-743-9712</p>	<p>04/12/06-1451-not in today, will be in Tues. 4/18. Then spoke with Ellen, she took a message and will try to reach him to call me.</p> <p>04/12/06-1705-spoke with Mark Ackerman, fax 208-799-5766, after 11 am tomorrow. Hospital # 208-743-2511</p> <p>04/13/06-1200-faxed memo</p> <p>04/17/06-1323-called office to speak with Mark. He not working today but will be tomorrow.</p> <p>04/18/06-1313-called office. I spoke with Mark and he states he is not interested.</p>		<p>04/18/06-1316 Mark is not interested.</p>
<p>Neurosurgery and Spine NW Coeur D Alene, ID 208-667-5536</p>	<p>04/12/06-1455-no PA's employed. 208-667-5536.</p> <p>04/12/06-1458-208-664-5467, neurosurgery office, has a PA but no pain mgmt experience</p>		

Pain Management of North Idaho Dr. Magnuson-pain mgmt Coeur D'Alene, ID 208-765-4807	04/12/06-1500- called, no PA's in employment there		
Neuroscience Associates Boise, ID 208-367-3500 PA's names: Bryan Hart H. Neil Sweeten for Dr. Morlin Fax: 208-367-2968	04/12/06-1516-LM with Kim, the medical assistant. Faxed memo to each of the PA's at 1522. 04/17/06-1341- called office to speak with Bryan Hart. He works in surgery and does not feel he is qualified.		04/13/06- recd fax from Neil Sweeten, not interested. 04/17/06- per phone call, not qualified he feels.
Spine Institute of Idaho Meridian, ID 208-855-2900 Fax: 208-855-2936	04/12/06-1527- spoke with Sally. The PA is Douglas McVey, not in today, but may be interested. Faxed memo to him at 1527. 04/17/06 -1348- called the office. He not in till tomorrow. 04/18/06-1317- called office to speak with Douglas. He not back from lunch yet but he has recd the fax.		

Neurological Associates Boise Idaho 208-343-3976	04/12/06-1612- ext 11 for office manager Stephanie LM 1622- Stephanie called back. No PA's		
North Idaho Neurosurgical and Spine Association Coeur D'Alene ID 208-667-1376	04/12/06-1617-spoke with office manager Jan. no PA's in office		
Northview Medical Clinic Boise ID 208-376-8337	04/12/06-1620-no PA's there		
Idaho Spine Center Blackfoot ID 208-785-4665	04/12/06-1624- no PA's		
Creekside Pain Clinic Idaho falls ID 208-524-0610 fax 208-557-0171	04/12/06-1624- there is a PA with pain mgmt exp. The name is Kathy Hemming, but out till Monday. I faxed over the memo at 1630.		04/13/06- Recd fax from Kathy Hemming. not interested.
Lewiston Orthopedics Lewiston ID 208-743-3523 fax 208-746-8741 PA- Leroy Keene	04/13/06-1122- called office. LM for Leroy, out of office until Monday. Also, faxed memo to office. 04/17/06- 1350- called the office. Spoke with Leroy and he feels he is not interested. does not have a lot of experience in pain mgmt.		04/17/06-1354-Leroy Keene not interested.

Idaho Neurological Surgery Doug Smith, MD Boise, Idaho 208-344-1000	04/13/06-1134- spoke with Christine, other PA's employed there.		
Eastern Idaho Neurological Surgery Idaho Falls, ID 208-535-4170	04/13/06-1136- no PA's employed there.		
Marc Porot, MD Blackfoot, ID 208-785-3800 fax: 208-782-3752 PA- Mark Hyde	04/13/06-1138- called office. Faxed the memo to Mark. 04/17/06-1355- called the office. Mark Hyde not in until tomorrow. 04/18/06-1320-called office. He not in today but will be tomorrow.		
Kenneth Bratt, MD Ketchum, ID 208-578-3481 Twin Falls office- 208-737-2530 Gooding Office- 208-934-8829	04/13/06-1146-called and EM at Ketchum office. 04/14/06-1310- called office-EM. 04/17/06-1357- called office, no PA's employed there. 04/13/06-1146- no PA's employed here. 04/13/06-1148-called office, no PA's employed here.		
Idaho Sports Medicine Institute 208-336-8250	04/14/06-1312- spoke with Laurie, no PA's employed there.		

Boise Surgical Group Dr. Bourland Boise, ID 208-367-2834	04/16/04-1314- called office, no PA's employed there.		
Boise Orthopedic Clinic BOC Sports Med 208-323-2600 fax: 208-375-2419 Roy Sternes Mary Ann Ozier, ext 317. Ben Kernes Michele Ardeson Meridian Office 208-898-0100	04/14/06-1315- called the office, there are four PA's that order pain meds under MD. Faxed memos to each one. 04/17/06-1358- called the office. Michele not in today, LM for all of the others 04/18/06-1321-called the office, the PA's not in today. Mary Ann in Thursday, Roy in Meridian office tomorrow.		04/18/06-Mary Ann Ozier not interested.

COPY

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

VAUGHN SCHMECHEL, individually, and
as Surviving Spouse and Personal
Representative of the Estate of ROSALIE
SCHMECHEL, deceased, and ROBERT P
LEWIS, KIM HOWARD and TAMARA
HALL, natural children of ROSALIE
SCHMECHEL, deceased,

Plaintiffs,

vs.

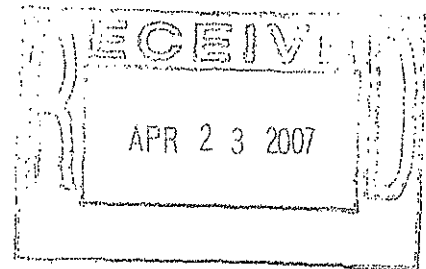
CLINTON DILLE, M.D., SOUTHERN
IDAHO PAIN INSTITUTE, an Idaho
corporation, THOMAS BYRNE, P.A., and
JOHN DOE and JANE DOE, I through X,

Defendants.

DISTRICT COURT
TWIN FALLS CO., IDAHO
FILED

2007 APR 20 AM 9:33

BY _____
CLERK
DEPUTY



Case No. CV 05-4345

PLAINTIFFS' EXPERT WITNESS
DISCLOSURES



COME NOW Plaintiffs, by and through their attorneys of record, David E. Comstock, of Comstock & Bush, and Byron V. Foster, Attorney at Law, and pursuant to the Court's Scheduling Order and in accordance with I.R.C.P. 26, hereby disclose Plaintiffs' expert witnesses to be called at the trial of this case:

1. **Jim E. Keller, M.P.H., PA-C.**
Director, Physician Assistant Program,
Red Rocks Community College,
Lakewood, Colorado, 80228.

A. Subject matter of expected testimony.

Mr. Keller is expected to testify concerning the applicable standard of health care practice for Defendant Thomas Byrne, P.A. The opinions expressed below by Mr. Keller are opinions which he holds to a reasonable degree of medical certainty.

B. Substance of facts.

Mr. Keller has reviewed the medical records of Rosalie Schmechel generated by Southern Idaho Pain and Rehabilitation Institute; Sun Valley Pain and Sleep Center; Twin Falls County Coroner Autopsy Report; Twin Falls County Coroner Record of Death; Thomas Byrne, P.A.'s handwritten medical regimen; and the depositions of Defendant Dille, Defendant Byrne, Robert Lewis, Kim Howard and Tamara Hall.

It is expected that Mr. Keller will also review depositions taken in the future of various experts and/or treating health care providers as well as the deposition of Vaughn Schmechel. In addition, Mr. Keller has reviewed Federal guidelines dealing with methadone prescription contained within the code of Federal Regulations as well as various DEA documents, the model policy for use of controlled substances and is expected

to review other literature and materials regarding the subject matter of this litigation.

Mr. Keller will testify as to his understanding as to the facts of this case based upon his review of the above-referenced documents and depositions.

C. Substance of opinions.

Mr. Keller is of the opinion that it was a violation of the applicable standard of health care practice for Defendant Byrne to begin Rosalie Schmechel on a new drug regimen on a Friday. The guidelines for medication changes with regard to methadone indicate that during the initial titration stages, the practitioner in charge of the switch in medications should see the patient every day until the methadone reaches a therapeutic level. During that period of time, the practitioner should be watching for any adverse reactions and validating that there are no problems with metabolism of the methadone. Every patient is different with regard to metabolizing methadone and until you understand how the specific patient is going to react, the patient needs to be carefully monitored. Careful monitoring means seeing the patient every day during this period of time.

Mr. Keller is also of the opinion that it was a violation of the applicable standard of health care practice for Mr. Byrne to fail to communicate by telephone with Kimberly Vorse, M.D., Rosalie Schmechel's previous pain management physician. He is also of the opinion that it was a violation of the applicable standard of health care practice to fail to request Dr. Vorse's records. Under circumstances where a switch to methadone from OxyContin is anticipated, it is vitally important to obtain the patient's previous pain care records in order to gain an understanding of the patient's compliance with medications, adverse reactions, therapeutic levels and to validate the information given to the practitioner by the patient.

Mr. Keller is of the opinion that the instructions given to Mrs. Schmechel, as indicated in Mr. Byrne's typewritten office note of September 26, 2003, were confusing when contrasted against the handwritten instruction sheet which he also gave to Mrs. Schmechel. The patient could well have misinterpreted the instructions given and increased the dosage of methadone to 30mg per day too quickly, thus resulting in an overload of methadone based upon methadone's long half-life and the difficulty of ascertaining, in the initial stages, when a therapeutic level has been achieved. Once therapeutic levels are achieved, the practitioner can taper the medication dosage but until that therapeutic level is achieved, the practitioner cannot accurately ascertain how the patient is going to react to the new medication. Thus, the necessity of seeing the patient on a daily basis during this initial switch in medications.

During the initial titration phase of methadone treatment, the patient needs to be seen daily to determine:

1. How much breakthrough pain the patient is experiencing and how much hydrocodone the patient is using for this breakthrough pain;
2. If the breakthrough episodes are frequent, the methadone dose may be increased;
3. When breakthrough episodes decrease, the practitioner can gain a better understanding whether or not the methadone is achieving a therapeutic level;
4. After five (5) to seven (7) days, the practitioner can usually determine what the maintenance dose will be;
5. The beginning of titration is the most critical time. The initial three (3) to

seven (7) days during titration is when patients encounter the most problems with fluctuating metabolism and relative over or under dosing. Thus, the need to closely monitor.

Another reason why Rosalie Schmechel needed to be closely monitored during the titration phase of her switch to methadone was because of her history of sleep apnea and the use of CPAP. She would be taking a new respiratory depressant (methadone) in conjunction with hydrocodone and the practitioner would need to determine the relative affect of those medications in combination on an individual with severe obstructive sleep apnea. In addition, Mrs. Schmechel was a smoker and suffered from hypertension, two additional reasons for very close monitoring during the titration period.

Mr. Keller is also of the opinion that Defendant Byrne's initial prescription for 90 methadone and 70 hydrocodone was a violation of the applicable standard of health care practice. When titrating methadone, the practitioner should only prescribe the amount needed for initial titration to determine how the patient is going to react to the change in medication. Once the patient metabolizes the drug to a maintenance level, the practitioner should then prescribe sufficient medication to last one (1) week and then see the patient after that one (1) week period of time for a prescription refill. The patient needs to be checked in person by the practitioner in order to verify the maintenance dosage is sufficient, and there are no adverse affects, changes in mentation or sedation level, or other potential adverse reactions or unanticipated side affects encountered.

With regard to the issue of whether or not Defendant Byrne spoke to Rosalie Schmechel on Saturday and/or Sunday September 27 and 28, 2003; Mr. Keller

understands there is a factual dispute based upon his review of the various depositions provided to him. Mr. Keller is of the opinion that had Defendant Byrne spoken by telephone with Mrs. Schmechel on Saturday and Sunday, September 27 and 28, 2003, it would have shown at least some recognition on Defendant Byrne's part that Mrs. Schmechel needed to be closely monitored. However, under these circumstances, a telephone call would not have been sufficient and Defendant Byrne should have seen and examined Mrs. Schmechel in person. Thus, the reason for not beginning titration of methadone as a change in medication on a weekend. However, if telephone calls took place between Defendant Byrne and Mrs. Schmechel on those two dates and the information conveyed as per Robert Lewis' deposition testimony was indeed given to Defendant Byrne, he would have been under an obligation, pursuant to the applicable standard of health care practice, to see and examine Mrs. Schmechel to determine the cause of her nausea and lower extremity edema. Nausea in the setting of a change from OxyContin to methadone is abnormal and would call for further work-up. In addition, lower extremity edema in this same setting is alarming and would call for an examination by the practitioner to determine the cause of the edema and to take steps to remedy the situation.

Mr. Keller is of the opinion that had Defendant Byrne appropriately followed Mrs. Schmechel during the period of time from the inception of methadone titration until the date of her death and appropriately reacted to her developing medical condition as evidenced by the testimony of her family, her death from combined methadone/hydrocodone toxicity could have been prevented.

D. Witness's credentials.

Attached hereto as Exhibit "A" is the curriculum vitae of Jim E. Keller. Mr. Keller charges \$125.00 per hour and while at present it is unknown whether he has previously testified by deposition or in trial on other cases where he has been retained as an expert; this information will be forthcoming by supplementation.

2. **Arthur G. Lipman, Pharm. D.**
Professor, Department of Pharmacotherapy, College of Pharmacy
Adjunct Professor, Department of Anesthesiology,
School of Medicine
Director of Clinical Pharmacology, Pain Management Center,
University Healthcare
University of Utah Health Sciences Center
Salt Lake City, Utah

A. Subject matter of expected testimony.

Dr. Lipman is expected to testify regarding the applicable standard of health care practice for individuals who hold themselves out as specialists in pain management. He will testify concerning the pharmacokinetics of methadone, OxyContin, hydrocodone and the other medications which had been prescribed for decedent Rosalie Schmechel by Defendants and her other treating physicians. He will testify and comment on the testimony of Defendants and their disclosed expert witnesses. He will testify, in part, on literature and research conducted by himself and others in his field of expertise. He is expected to utilize, in order to clarify his opinions, various models, graphs and other visual aids dealing with the pharmacokinetics of the medications at issue in this litigation.

B. Substance of Facts.

Dr. Lipman has reviewed the medical records of Rosalie Schmechel generated by

Southern Idaho Pain and Rehabilitation Institute; Sun Valley Pain and Sleep Center; Twin Falls County Coroner Record of Death; Thomas Byrne, P.A.'s handwritten medical regimen; and the depositions of Defendant Dille, Defendant Byrne, Robert Lewis, Kim Howard and Tamara Hall. In addition, Dr. Lipman has spoken with Kimberly Vorse, M.D., a physician in Sun Valley, Idaho, who specializes in pain medicine and sleep medicine and discussed the standard of care as it existed in September/October 2003 in both the Wood River Valley (Sun Valley, Ketchum, Hailey) and the Magic Valley (Twin Falls).

It is expected that Dr. Lipman will also review depositions taken in the future of various experts and/or treating health care providers as well as the deposition of Vaughn Schmechel. In addition, Dr. Lipman has reviewed Federal guidelines dealing with pain management and epidemiological publications on methadone toxicity; Federal Regulations; documents generated by the Centers for Disease Control and the MMWR Weekly Newsletter dealing with the incidence of unintentional drug poisoning related to methadone administration in the State of Utah. He is also expected to review other literature and materials regarding the subject matter of this litigation.

Dr. Lipman will testify as to his understanding as to the facts of this case based upon his review of the above-referenced documents and depositions.

C. Substance of Opinions.

The opinions expressed by Dr. Lipman herein are opinions he holds to a reasonable medical certainty or probability.

In the early 1990s there began a push, fueled by Medicare and insurance companies, to increase the prescription of methadone because of its relatively decreased

cost compared to OxyContin. However, the increased danger of the use of methadone for pain management appears to have been incompletely understood by some pain management practitioners, including the Defendants herein.

Dr. Lipman is of the opinion that the methodology employed by Defendants Byrne and Dille in switching Rosalie Schmechel from OxyContin to methadone evidenced a lack of understanding of the pharmacokinetics of both medications and this lack of understanding led to her death.

Dr. Dille failed to appropriately supervise Byrne in the change of medications and this lack of supervision resulted in Byrne prescribing an initial titration dosage which called for increasing dosages too soon after inception and a dosing schedule which resulted in inadequate analgesia which would result in inadequate pain relief while at the same time resulting in serum levels of methadone rising too quickly. Thus the level of methadone in Mrs. Schmechel's blood rose to toxic levels at the same time she was obtaining inadequate pain relief, necessitating the use of the short acting opioid, hydrocodone during the titration phase which eventually resulted in lethal and toxic ranges of both medications, ending in overdose.

It is evident from a review of the medical records and depositions of Defendants that neither properly understood how to manage the change in medications. First of all, they failed to gain a detailed understanding of the patient's past treatment by failing to obtain the records of Dr. Kimberly Vorse or speak with her prior to initiating a change to methadone. Second, after noting that Mrs. Schmechel suffered from sleep apnea and utilized a CPAP machine to assist with breathing, they failed to conduct a thorough

investigation to determine whether the patient was compliant in using the machine and how her sleep apnea would potentially interact with methadone. Third, Defendant Dille totally failed in his obligation to supervise the activities of Defendant Byrne. If Byrne was authorized by the State of Idaho to prescribe this change in pain medication, after doing so in a manner violative of the applicable standard of health care practice, Dille then failed to oversee this process when he was informed of the plan of care on September 29th of 2003. Whether through inadvertence or ignorance, Dille failed to realize that the verbal instructions given by Byrne, in conjunction with the handwritten instructions given to the patient would result in too rapid a rise in serum levels of methadone in a situation where both Defendants evidenced an inadequate knowledge of the proper methodology for this change in pain management.

The initial dosing regimen of methadone was incorrect because the dosage schedule should have been every 8 hours, not every 12 hours. Methadone's analgesic effects initially may last only 4 to 6 hours and normally have a maximum of 8 hours. If the medication is taken every 12 hours, the effects will wear off before the second dose takes effect. This fact, in conjunction with the confusing and incorrect information contained in Defendant Byrne's handwritten note resulted in Mrs. Schmechel titrating the medication too rapidly. The serum levels rose too quickly under a dosing schedule which made the analgesic effects sub-optimal. Both Dille and Byrne should have known this before they undertook to switch the medications. Dille should certainly have understood this if he talked to Byrne on September 29th. At that time the standard of health care practice mandated that Dille take steps to correct the situation before it resulted in Mrs. Schmechel's death.

It can take up to ten days to reach a steady state serum level of methadone. Until the steady state is reached, serum levels continue to rise. This is a critical time in this process and the patient must be closely monitored for any adverse effects or the existence of any new signs or symptoms of impending medical crises. Thus the drug must be titrated very slowly, which was not done here. While Byrne may have indicated verbally for Mrs. Schmechel to titrate slowly, he apparently did not indicate how slowly because he told her she could increase the dose over the weekend. Furthermore, the written instructions he gave her resulted in a too rapid titration.

In their depositions, Both Byrne and Dille talk about the fact that since the patient was a chronic user of pain medications, she should have had a tolerance to those medications. While this may be true in a simplistic sense, the critical issue is that Mrs. Schmechel was naïve to methadone. She therefore had limited if any tolerance to it specifically and the respiratory depressant effects caused by that specific medication. A tolerance to one respiratory depressant does not necessarily equate to a tolerance to methadone and both Defendants should have known that. It takes five to seven days of properly slow titration before the respiratory depressant effects of any opioid provide tolerance to respiratory depression. Methadone appears to preferentially act on a different subtype of the mu-opioid receptor than other opioids she had previously utilized. Therefore, had she been tolerant to OxyContin and/or hydrocodone she would not necessarily have had full tolerance to the respiratory depressant effect of newly initiated methadone.

Dr. Lipman realizes there exists a conflict in the accounts of telephone conversations which took place on Saturday and Sunday, September 27th and 28th, 2003.

However, if the information was imparted to Defendant Byrne that Rosalie was experiencing nausea, was sick to the stomach, was experiencing lower extremity edema and noticed an increased level of sedation, these factors should have led Defendants to see and examine the patient and modify her medication regimen accordingly.

Another critical factor is the failure of either Defendant to fully investigate and understand specific information regarding Mrs. Schmechel's sleep apnea and her use of CPAP. The danger of potentially fatal respiratory depression under these circumstances is well known and calls for a thorough knowledge of the circumstances surrounding this condition and its treatment.

For all of the above reasons, it is my considered opinion, which I hold to a reasonable medical certainty or probability, that the activities of Defendants Dille and Byrne in the way they changed the patient from OxyContin to methadone; the failure to closely monitor the patient during the initial titration period; the confusing and incorrect dosing and administration schedule; the failure to properly ascertain her past treatment and records; the failure to modify those dosing schedules and intervals; evidence a lack of understanding of appropriate pain management and resulted in the prescription of a medication in a manner which was predictably lethal.

Under the circumstances, the activities of these two health care providers constituted extreme departures from applicable standards of health care practice and constituted reckless conduct.

D. Witness's credentials.

Attached hereto as Exhibit "B" is the curriculum vitae of Arthur G. Lipman, and the

record of his testimony. Dr. Lipman charges \$450.00 per hour.

3. **Stephen P. Lordon, M.D.**
Medical Director, Summit Pain Management
Murray, Utah

A. **Subject matter of expected testimony.**

Dr. Lordon, who is Board Certified in Anesthesiology and Board Certified in Pain Management, is expected to testify regarding the standard of health care practice applicable to individuals who hold themselves out as specialists in pain management. He will testify concerning the various medications which decedent Rosalie Schmechel was prescribed and the various interactions between those medications. He will testify based upon his review of medical records, depositions, medical literature and his knowledge and experience in treating chronic pain patients. He will testify and comment on the testimony of Defendants, their expert witnesses and other treating health care providers. He will participate in a telephone conference with a pain management specialist practicing in Idaho regarding the applicable standard of health care practice.

B. **Substance of Facts.**

Dr. Lordon has reviewed the medical records of Rosalie Schmechel generated by Southern Idaho Pain and Rehabilitation Institute; Sun Valley Pain and Sleep Center; Twin Falls Coroner Record of Death; Thomas Byrne, P.A.'s handwritten medical regimen; and the depositions of Defendant Dille, Defendant Byrne, Robert Lewis, Kim Howard and Tamara Hall.

It is expected that Dr. Lordon will also review depositions taken in the future of various experts and/or treating health care providers as well as the deposition of Vaughn

Schmechel. In Addition, Dr. Lordon may base his testimony, in part, on medical literature and other documents concerning methadone; methadone dosing guidelines; drug interactions and other subjects at issue in this litigation.

Dr. Lordon will testify as to his understanding of the facts of this case based upon his review of the above-referenced documents and depositions.

C. Substance of opinions.

The opinions expressed by Dr. Lordon herein are opinions which he holds to a reasonable degree of medical certainty or probability.

Dr. Lordon is of the opinion that the instructions which Defendant Byrne gave to Mrs. Schmechel concerning the change from OxyContin to methadone were incorrect, inadequate and vague; resulting in a miscommunication of the proper methodology for initial titration of methadone which caused a lethal build-up of methadone in her blood in combination with hydrocodone and amitriptyline. The standard of health care practice applicable to Defendant Byrne required him to possess the knowledge that the proper methodology calls for low levels of methadone to be instituted initially. This regimen is to be maintained for the first seven days until the practitioner determines the effect of the drug and can gauge how optimum serum levels are going to be tolerated. In an individual such as this patient with concomitant medical conditions, this period of time may increase to ten days. The handwritten instructions given by Mr. Byrne to the patient were vague and indicated she could increase the dosage to a total of 30 mg in a short period of time. This is too much methadone in too short a period of time and constituted a violation of the applicable standard of health care practice. To assume Mrs. Schmechel could tolerate

such a high dosage of methadone in such a short period of time is not clinically sound.

Dr. Lordon is aware there are inconsistencies between Mr. Byrne's typed notes, the handwritten note and his deposition testimony, however, Mrs. Schmechel would have been justified in following the written instructions she received and these instructions were, quite simply, not clinically sound.

A compounding factor in Mrs. Schmechel's case is the presence of sleep apnea and the use of CPAP. Mrs. Schmechel stood 5 feet 4 inches in height and weighed 220 pounds. Her body mass index is 37.8. She meets the criteria for morbid obesity which makes the presence of sleep apnea an even greater concern when instituting methadone therapy for pain management. The respiratory depressant effect of methadone cannot be determined without an adequate low, slow titration timetable not evidenced here. In addition Defendants Dille and Byrne took no measures to investigate the patient's past treatment or how she reacted to that treatment; they merely obtained that information from the patient on her first visit without any attempt at verification with her previous treating physician. This was, under the circumstances sub-standard care by both defendants.

The initial titration period is the most dangerous time for the patient and both Defendants do not appear to have appreciated this medical fact resulting in the patient reaching toxic serum levels caused by administration of too much medication over too short a period of time. If anything, Mrs. Schmechel should have been under dosed for the first seven days until her reaction to this new drug regimen could be accurately determined. By giving vague instructions which resulted in the dosage increasing from 10 to 30 mg over a three day period, not enough time was allowed for the original 10 mg dose to stabilize.

It is evident from the methodology utilized by Byrne and Dille that neither appropriately understood the pharmacokinetics and pharmacodynamics of methadone and this constitutes a violation of the standard of health care practice.

One of the critical points in this process is the conversation which Defendant Dille testified to having with Defendant Byrne on Monday, September 29th. At that point in time Dille should have instructed Byrne that it was too soon to have the patient on 30mg of methadone per day and the situation should have been immediately rectified. The failure to take this action was a departure from the applicable standard of health care practice and directly resulted in Mrs. Schmechel's death.

Mrs. Schmechel was a complex patient with a complex history of pain management, sleep apnea and CPAP use. Defendant Byrne would have been well advised to ask himself whether it was medically necessary or appropriate to change her medications on the first visit. Other options such as epidural steroids; spinal nerve stimulation or a spinal infusion pump should have been considered. In addition, methadone is an unpredictable medication and its relationship to respiratory depression in a patient like Mrs. Schmechel with sleep apnea is a real cause for concern. Byrne did not have all the information or knowledge to place Mrs. Schmechel on methadone, even if appropriately managed. While the decision of what course of action to take may, in the hands of a knowledgeable practitioner, be a matter of judgment; here Byrne's evident lack of knowledge and understanding of the pharmacokinetics and pharmacodynamics of methadone makes his decision to institute methadone under these circumstances a violation of the applicable standard of health care practice. The first choice of a competent treating health care

provider would have been to consider non opioid treatments, adequately assess her degree of sleep apnea, then consider an increase of the OxyContin dosage to determine if greater pain relief could be achieved without resort to methadone. OxyContin is a much more predictable drug and serum levels increase or decrease much more rapidly than methadone making it, under these circumstances, easier to control and easier to reach optimum pain relief. Evidently neither Byrne nor Dille possessed an understanding of this information.

Dr. Lordon will also discuss the inconsistencies in the testimony of the individuals involved concerning telephone conversations between the patient and Mr. Byrne, which; if those conversations occurred and information was conveyed to Byrne regarding nausea, stomach upset, sedation and lower extremity edema; would have mandated that action be taken by both defendants to examine Mrs. Schmechel and change the course of her treatment.

It is Dr. Lordon's opinion, to a reasonable medical certainty, that the violations of applicable standards of health care practice set forth above directly resulted in the death of Rosalie Schmechel.

D. Witness's credentials.

Attached hereto as Exhibit "C" is the curriculum vitae of Stephen P. Lordon, M. D. Dr. Lordon's fee schedule and prior testimony will be provided at a later time through supplementation.

4. **Kimberly Vorse, M.D.**
Sun Valley Pain and Sleep Center
180 West First Street
Ketchum, Idaho, 83340

Dr. Vorse is not a retained expert. She will be called upon to testify regarding her extensive treatment and involvement with Rosalie Schmechel through September 16, 2003. She will also testify that her practice, albeit located in Ketchum, Idaho, in the September/October 2003 time frame, involved treating pain patients from the Wood River Valley and the Magic Valley, including Twin Falls, Idaho. She will also describe how she conferred with and accepted referrals for physicians practicing in Twin Falls. As such, she will describe how she is personally familiar with the standard of care existing in the fall of 2003 for the care and treatment of pain patients like Rosalie Schmechel in the Wood River Valley and Twin Falls.

Dr. Vorse is expected to testify from her medical records regarding the care and treatment she provided, the pain management medications which she had prescribed for Rosalie Schmechel and the CPAP and other treatments she had provided for Rosalie Schmechel's severe sleep apnea. Dr. Vorse will discuss Rosalie Schmechel's medical history, medical conditions and how that history and those conditions impacted Dr. Vorse's treatment decisions with regard to pain management and sleep therapy. Dr. Vorse will discuss the importance of various aspects of Rosalie Schmechel's past medical history to her subsequent treatment decisions.

Dr. Vorse is expected to testify regarding the relationship between sleep apnea, CPAP therapy and respiratory depressant medications. She may also testify with regard to

the pharmacokinetic properties of the various pain medications prescribed for the use of Rosalie Schmechel. It is anticipated that the deposition testimony of Dr. Vorse will be obtained by Defendants and she will testify in accordance with that expected deposition testimony.

5. Cornelius Hofman
The GEC Group
MBA Economics and Finance
University of Chicago

A. Subject matter of expected testimony.

Mr. Hofman is expected to testify concerning the economic losses to the Plaintiffs.

B. Substance of facts.

See Mr. Hofman's report, attached hereto as Exhibit "D."

C. Substance of opinions.

See Mr. Hofman's report, attached hereto as Exhibit "D."

D. Witness's credentials.

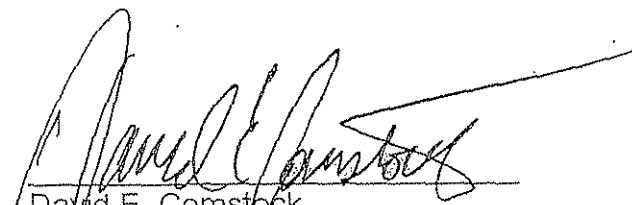
See the curriculum vitae of Cornelius Hofman, his fee schedule and a list of previous cases in which he has testified, attached hereto as Exhibit "E."

CAVEAT

It should be understood that Plaintiffs have made a good faith effort to set forth the substance of the opinions to which the above-named treating health care providers and experts will testify. However, it is impossible to specifically set forth every opinion these individuals will express and the exact manner in which those opinions will be expressed.

Plaintiffs reserve the right to elicit from the above-named health care providers / experts, additional testimony and opinions from those individuals based upon information subsequently produced, information gleaned during depositions of Defendants' experts and any subsequent opinions or information developed by the above-named individuals from other sources. As it is anticipated that the Defendants will obtain the deposition testimony of the above-named health care providers / experts, this expert disclosure should not be assumed to be all inclusive in nature. Plaintiffs also reserve the right to amend, modify, delete from or add to by supplementation, this disclosure as further information is developed through discovery. Plaintiffs also reserve the right to name and call as expert witnesses any individuals identified by any party as expert witnesses and also reserves the right to obtain medical testimony from any other health care provider named or identified during the discovery process.

DATED this 19th day of April, 2007.


David E. Comstock,
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

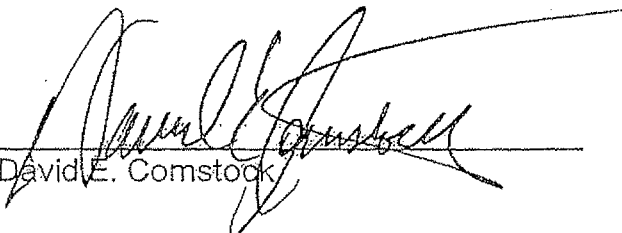
I hereby certify that on this 19th day of April, 2007, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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David E. Comstock

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

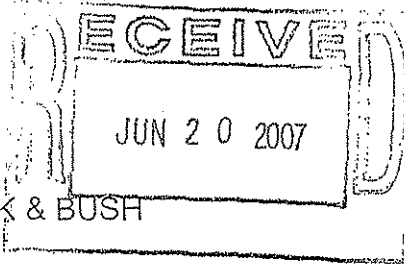
VAUGHN SCHMECHEL, individually, and
as Surviving Spouse and Personal
Representative of the Estate of ROSALIE
SCHMECHEL, deceased, and ROBERT P
LEWIS, KIM HOWARD and TAMARA
HALL, natural children of ROSALIE
SCHMECHEL, deceased,

Plaintiffs,

vs.

CLINTON DILLE, M.D., SOUTHERN
IDAHO PAIN INSTITUTE, an Idaho
corporation, THOMAS BYRNE, P.A., and
JOHN DOE and JANE DOE, I through X,

Defendants.



DISTRICT COURT
TWIN FALLS CO., IDAHO
FILED

2007 JUN 18 AM 9:57

BY _____
CLERK

DEPUTY

Case No. CV 05-4345

**PLAINTIFFS' FIRST SUPPLEMENTAL
EXPERT WITNESS DISCLOSURES**

COME NOW Plaintiffs, by and through their attorneys of record, David E. Comstock, of Comstock & Bush, and Byron V. Foster, Attorney at Law, and pursuant to the Court's Scheduling Order and in accordance with I.R.C.P. 26, hereby supplements their list of expert witnesses to be called at the trial of this case:

1. Arthur G. Lipman, Pharm. D.

With regard to Dr. Lipman's activities as Director of Clinical Pharmacology at the Pain Management Center, Dr. Lipman consults with attending physicians and other professional staff, including physician assistants in the center, instructs medical and doctor of pharmacy students, residents, and post-doctoral fellows in contemporary pharmacotherapy for pain management. He meets with chronic pain patients to help refine and directs their drug therapy and also presents research and clinical data at weekly pain research center meetings. In addition, he directs other pharmacists and trainees in the provision of pain management services and pharmacotherapy services.

All anesthesiology residents at university hospitals and clinics complete a minimum of a full month clerkship at the Pain Management Center during their residency. Residents from other services including internal medicine, family practice, physical medicine and rehabilitation also elect the clerkship

With regard to Dr. Lipman's activities involving physician assistants, while on the faculty of the Yale University School of Medicine from 1971 to 1977, Dr. Lipman created and taught a course in applied pharmacology for students in the Yale physician assistant program. He received the Jack Cole award for outstanding teaching to physician assistant students while at Yale. During that period of time, he worked with the American Academy

of Physician Assistants to help develop regulations permitting PA's to prescribe controlled substances, including opioids. The Academy successfully implemented such regulations in most jurisdictions during that period. When Dr. Lipman came to Utah in 1977 as a Department Chairman, he was invited by the Utah PA program to develop a course in applied pharmacology which he coordinated and which he taught for over twenty years. He received an outstanding teaching award from a Utah physician assistants program numerous times in the 1970's through the 1990's. He was instrumental in developing a model pharmacology curriculum for PA programs under a grant in the 1990's and a majority of United States physician assistant programs adopted that model. The year-long Utah physician assistant pharmacology course remains a corner stone of the Utah physician assistant program which now grants Master's degrees in physician assistant studies (MSPAS).

2. Stephen P. Lordon, M.D., and Arthur G. Lipman, Pharm. D.

On April 30, 2007, Drs. Lipman and Lordon participated in a telephone conversation with Craig Flinders, M.D., an anesthesiologists/pain management specialist practicing in Lewiston, Idaho. Dr. Flinders is a member of the Idaho Pain Society, a subdivision of the American Society of Pain Physicians. Over his years of practice, he has had occasion to discuss pain management topics with his Idaho colleagues. Based upon his contacts with other pain management physicians in Idaho, Dr. Flinders is of the opinion that his practice of pain management in Lewiston does not deviate from the practice of pain management in Twin Falls, Idaho, specifically, with regard to September of 2003.


Drs. Lipman, Lordon and Flinders discussed specifically a patient such as Rosalie Schmechel who had co-morbid diseases including severe sleep apnea and the use of CPAP. They agreed that the presence of severe sleep apnea and the use of a CPAP is a crucial piece of information and prior to switching a patient from OxyContin to methadone, a practitioner of pain management, in order to comply with the applicable standard of health care practice, must become informed about the nature of the sleep apnea and the patient's use of CPAP. The practitioner must consult with the previous treating physician, not just rely on the patient's information given during the first visit. The patient's previous treatment history is vitally important and obtaining this history would include obtaining the past records and/or speaking to the previous provider to obtain detailed information prior to making a switch from OxyContin to methadone. The extent and severity of sleep apnea must be explored in order to properly treat the patient. The three discussed the obligations of a physician assistant under circumstances such as those presented by Rosalie Schmechel. The physician assistant must understand the importance of the patient's past medical history and must understand the differing pharmacokinetics and pharmacodynamics of the medications which the patient is presently taking versus the medications the patient is being prescribed. If the physician assistant lacks basic knowledge regarding the differing pharmacokinetics and pharmacodynamics of methadone versus OxyContin, the physician assistant should see direct supervision of the pain management physician and refrain from making a switch in these medications until both the patient's past medical history and vital drug information is obtained and taken into account. The supervising physician should know and understand the physician assistant's base of

knowledge with regard to both methadone and OxyContin and their differing pharmacokinetics and pharmacodynamics before allowing the physician assistant to prescribe a change in medications. If the supervising physician fails to appropriately supervise the physician assistant, this is a violation of the applicable standard of health care practice. Drs. Lipman, Lordon and Flinders agreed that a physician assistant should never be allowed to practice without close supervision. The physician assistant should not be performing the initial workup on a patient such as Rosalie Schmechel with a complicated past medical history. The variability of patient response to a medication switch from OxyContin to methadone requires that the physician be involved in making the initial decision, not merely consulting with the physician assistant after the fact. The past medical history must be explored and understood in order to properly treat the patient. Someone who knew the co-morbidities and pharmacokinetics should have been involved from the outset.

All three agreed that it is highly unusual to switch a pain patient from OxyContin to methadone on the first visit without first exploring other possibilities, including increasing the OxyContin dosage. All three agreed this was a complicated situation because methadone acts differently than other opioids and it is difficult to envision what reaction the patient will have, necessitating close monitoring during the initial titration period. Methadone should be initially prescribed on a three times per day basis at very low dosages for the first five to seven days until the qualified practitioner can gauge the patient's reaction to the switch. All three health care providers agreed that there exist no deviations; with regard to the subject matters of this litigation, between the standard of health care

practice as Dr. Flinders understands it to be in Idaho and the standard of health care practice to which Drs. Lipman and Lordon subscribe in Salt Lake City, Utah.

DATED this 15 day of June, 2007.


Byron V. Foster,
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

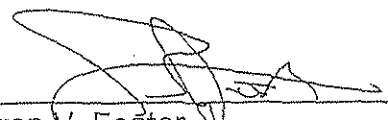
I hereby certify that on this 15 day of June, 2007, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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Byron V. Foster

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

VAUGHN SCHMECHEL, individually, and
as Surviving Spouse and Personal
Representative of the Estate of ROSALIE
SCHMECHEL, deceased, and ROBERT P
LEWIS, KIM HOWARD and TAMARA
HALL, natural children of ROSALIE
SCHMECHEL, deceased,

Plaintiffs,

vs.

CLINTON DILLE, M.D., SOUTHERN
IDAHO PAIN INSTITUTE, an Idaho
corporation, THOMAS BYRNE, P.A., and
JOHN DOE and JANE DOE, I through X,

Defendants.

Case No. CV 05-4345

**PLAINTIFFS' SECOND SUPPLEMENTAL
EXPERT WITNESS DISCLOSURES**

DISTRICT COURT
TWIN FALLS CO., IDAHO
FILED

2007 SEP 10 AM 9:49

BY _____
CLERK
DEPUTY

RECEIVED

SEP 12 2007

COME NOW Plaintiffs, by and through their attorneys of record, David E. Comstock, of Comstock & Bush, and Byron V. Foster, Attorney at Law, and pursuant to the Court's Scheduling Order and in accordance with I.R.C.P. 26, hereby supplements their list of expert witnesses to be called at the trial of this case:

1. Arthur G. Lipman, Pharm. D.

On September 6, 2007, Arthur Lipman, Pharm. D. spoke by telephone with David Martin, PA-C, a professor in the Physician's Assistant program at Idaho State University. Mr. Martin has been a practicing physician's assistant in Idaho since August of 1980, having practiced in Challis, Salmon and now Pocatello. He became a professor at Idaho State University in August of 2003.

Mr. Martin indicated that he is now and was in 2003 a member of the Idaho Academy of Physician's Assistants, had attended meetings of that organization and had spoken on several occasions to other southeast Idaho physician's assistants regarding issues related to, among other things, the management and treatment of chronic pain patients. Through his practice as a physician's assistant in southeast Idaho, his teaching of physician's assistant students at Idaho State University and his conversations with other physician's assistants in Idaho, Mr. Martin indicated he is familiar with the standard of health care practice applicable to a physician's assistant treating and managing a chronic pain patient in southeast Idaho in September of 2003.

Dr. Lipman and Mr. Martin discussed the standard of health care practice for a physician's assistant prescribing Schedule II pain medications to a chronic pain patient in southeast Idaho in September of 2003. The two discussed the necessity of having an

understanding of the new patient's medical history, obtaining the previous treating pain specialist's records, the importance of understanding the new patient's co-morbidities, the necessity of careful titration when switching from Oxycontin to Methadone and the necessity of close follow-up during the titration period to assure the safety of the patient until steady state Methadone levels are reached. They discussed the relatively long half of Methadone, the euphoric effects of Oxycontin versus Methadone and the methodology of achieving optimal analgesic effect.

The two agreed that, in September of 2003, there existed no deviations between the standard of health care practice applicable to a physician's assistant practicing in southeast Idaho in these regards and the standard of health care practice applicable to a physician's assistant practicing under these same circumstances in Salt Lake City, Utah, during the same time period.

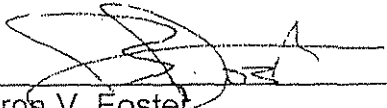
2. Jim E. Keller, PA

On September 6, 2007, Jim E. Keller, PA, spoke by telephone with David Martin, PA-C, a professor in the Physician's Assistant program at Idaho State University. Mr. Martin has been a practicing physician's assistant in Idaho since August of 1980, having practiced in Challis, Salmon and now Pocatello. He became a professor at Idaho State University in August of 2003.

Mr. Martin indicated that he is now and was in 2003 a member of the Idaho Academy of Physician's Assistants, had attended meetings of that organization and had spoken on several occasions to other southeast Idaho physician's assistants regarding issues related to, among other things, the management and treatment of chronic pain

Based upon their conversation, Mr. Keller and Mr. Martin agreed that, in September of 2003, there existed no deviations between the standard of health care practice applicable to a physician's assistant practicing in southeast Idaho in these regards and the standard of health care practice applicable to a physician's assistant practicing under these same circumstances in the area of Denver, Colorado, during the same time period.

DATED this 6 day of September, 2007.



Byron V. Foster
Attorney for Plaintiffs

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Attorneys for Plaintiffs

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

VAUGHN SCHMECHEL, individually, and
as Surviving Spouse and Personal
Representative of the Estate of ROSALIE
SCHMECHEL, deceased, and ROBERT P
LEWIS, KIM HOWARD and TAMARA
HALL, natural children of ROSALIE
SCHMECHEL, deceased,

Plaintiffs,

vs.

CLINTON DILLE, M.D., SOUTHERN
IDAHO PAIN INSTITUTE, an Idaho
corporation, THOMAS BYRNE, P.A., and
JOHN DOE and JANE DOE, I through X,

Defendants.

Case No. CV 05-4345

**PLAINTIFFS' THIRD SUPPLEMENTAL
EXPERT WITNESS DISCLOSURES**

assistant treating and managing a chronic pain patient in southeast Idaho in September of 2003.

Dr. Lordon and Mr. Martin discussed the standard of health care practice applicable to a physician's assistant prescribing Schedule II pain medications to a chronic pain patient in southeast Idaho in September of 2003 and determined that there were no deviations with regard to the issues in this case, in September of 2003, between the applicable standard of health care practice for a physician's assistant practicing in southeast Idaho and a physician's assistant practicing in Salt Lake City, Utah. The two discussed the fact that Dr. Lordon employs two physician's assistants in his office and did so in September of 2003. The two discussed the manner and methodology of supervision of a physician's assistant by the supervising physician and determined that, with regard to the issues involved in this litigation, there existed, in September of 2003, no deviations in the applicable standard of health care practice regarding the interaction between the supervising physician and the physician's assistant. The two agreed that the manner and methodology Dr. Lordon utilizes in supervising his physician's assistants did not deviate from what would be expected in such a supervisory relationship in southeast Idaho in September of 2003.

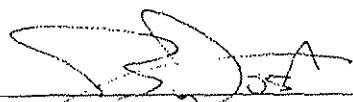
The two agreed that in September of 2003, there were also no deviations between Dr. Lordon's practice in Salt Lake City and the physician's assistant practice in southeast Idaho with regard to the necessity of obtaining a full and accurate medical history and an understanding of the new patient's past pain management in order to determine what types of pain medications had previously been utilized and the relative success of those

medication regimens. They both agreed that patients often omit information unintentionally and that this omitted information can be important to treatment decisions.

Dr. Lordon and Mr. Martin also discussed their opinion that the applicable standard of health care practice for both a physician's assistant and an M.D. treating a chronic pain patient in either Salt Lake City or southeast Idaho in September of 2003 would have mandated that the patient receive the same level of care whether the pain management was overseen by the physician's assistant or the M.D. In other words, both agreed that the patient should not receive a lower level of care with regard to pain management in situations where, as here, the patient was not seen by the supervising physician. They agreed there were no deviations with regard to this principle between Dr. Lordon's practice in Salt Lake City in September of 2003 and Mr. Martin's understanding of the applicable standard of health care practice in southeast Idaho during the same time frame.

The two agreed that the general principles involved in starting a new patient on Methadone pain therapy call for starting on a low dose, titrating slowly upward at no less than seven day intervals and maintaining close monitoring of the patient until steady state levels are reached. They agreed this was the standard that existed in September of 2003 in both southeast Idaho and Salt Lake City, Utah.

DATED this 11 day of September, 2007.



Byron V. Foster
Attorney for Plaintiffs

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Attorneys for Plaintiffs

DISTRICT COURT
TWIN FALLS CO., IDAHO
FILED

2007 OCT -9 AM 10:52

BY M CLERK

DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

VAUGHN SCHMECHEL, individually, and
as Surviving Spouse and Personal
Representative of the Estate of ROSALIE
SCHMECHEL, deceased, and ROBERT P
LEWIS, KIM HOWARD and TAMARA
HALL, natural children of ROSALIE
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Plaintiffs,

vs.

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Defendants.

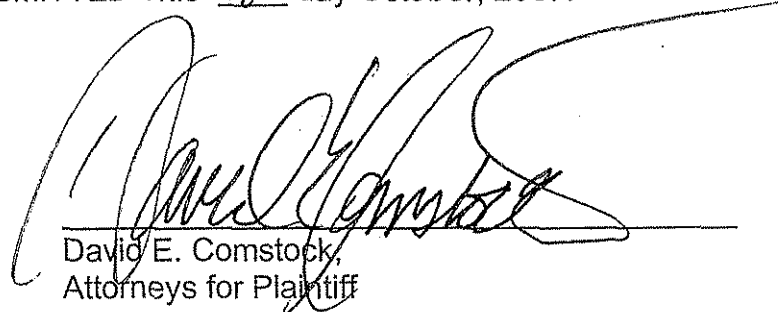
Case No. CV 05-4345

**PLAINTIFFS' PROPOSED JURY
INSTRUCTIONS**

COME NOW, Plaintiffs, by and through their attorneys of record, David E. Comstock, of the firm Comstock and Bush, and Byron V. Foster, Attorney at Law, and pursuant to Rule 51 of the Idaho Rules of Civil Procedure, and hereby submits the following proposed jury instructions and Special Verdict Form attached at Exhibits "A" and "B" respectively.

A clean copy of the proposed jury instructions is attached as Exhibit "C" for the Court's convenience.

RESPECTFULLY SUBMITTED This 8th day October, 2007.



David E. Comstock,
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2007, I served a true and correct copy of the above and foregoing instrument, by method indicated below, upon:

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Attorneys for Thomas Byrne, PA

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David E. Comstock

INSTRUCTION NO. 1

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

IDJ12d 1.01.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____



INSTRUCTION NO. 2

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.
2. You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.
3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.
4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.
5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.
6. You must not go to the place where any alleged event occurred.

IDJ12d 1.03.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 3

Certain evidence is about to be presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing [and upon video tape]. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear, this record will not be available to you during your deliberations.

IDJI2d 1.22.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 4

In this case, Plaintiff Vaughn Schmechel claims or alleges that he suffered the wrongful death of his wife, Rosalie Schmechel, based upon the medical negligence of Defendants Clinton Dille, M.D., Thomas Byrne, P.A., and Southern Idaho Pain Institute.. It will be for you to determine whether Defendants were negligent and whether such medical negligence was a proximate cause of Rosalie Schmechel's death. As a consequence of Rosalie Schmechel's death, Vaughn Schmechel alleges he has and will suffer the loss of her love, companionship, society and financial support and he seeks to recover damages for these losses.

In addition to the claims just discussed, Plaintiffs Robert Lewis, Kim Howard and Tamara Hall claim they suffered the wrongful death of their mother, Rosalie Schmechel, based upon the medical negligence of Defendants Clinton Dille, M.D., Thomas Byrne, P.A., and Southern Idaho Pain Institute.. It will be for you to determine whether Defendants were negligent and whether such medical negligence was a proximate cause of Rosalie Schmechel's death. As a consequence of Rosalie Schmechel's death, Robert Lewis, Kim Howard and Tamara Hall allege they have and will suffer the loss of her love, companionship, and society and they seek to recover damages for these losses.

IDJI2d 1.30.2. (Modified)

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 5

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

IDJI2d 1.05.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 6

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit

or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

[There were occasions where an objection was made after an answer was given or the remark was made, and in my ruling on the objection I instructed that the answer or remark be stricken, or directed that you disregard the answer or remark and dismiss it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.]

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

IDJI2d 1.00.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. 7

On the claim of medical negligence against the Defendant Clinton Dille, M.D., Thomas Byrne, P.A., and Southern Idaho Pain Institute, for the death of Rosalie Schmechel, Plaintiffs have the burden of proof on each of the following propositions:

1. That Defendants failed to meet the applicable standard of care as defined in these instructions;
2. That Rosalie Schmechel was injured;
3. That the acts of Defendants which failed to meet the applicable standard of care were a proximate cause of the injuries to and the death of Rosalie Schmechel; and
4. The elements of damage and the amount thereof.

IDJI2d 2.10.3.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. 8

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

IDJI2d 1.20.1.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 9

When I use the expression "proximate cause," I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

IDJI2d 2.30.2. (modified)

Newberry v. Martens, 142 Idaho 284,
127 P.3d 187 (2005)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. 10

Thomas Byrne, P.A., who was involved in the care of Rosalie Schmechel was an employee of Southern Idaho Pain Institute at the time of the occurrence. Therefore, you are instructed any act or omission of Thomas Byrne, P.A... in his care of Rosalie Schmechel was the act or omission of the Defendant Southern Idaho Pain Institute.

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. 11

Clinton Dille, M.D., who was involved in the care of Rosalie Schmechel was an employee of Southern Idaho Pain Institute at the time of the occurrence. Therefore, you are instructed any act or omission of Clinton Dille, M.D.. in his care of Rosalie Schmechel was the act or omission of the Defendant Southern Idaho Pain Institute.

IDJI 250 (Modified).

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. 12

A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree of skill and learning ordinarily possessed and exercised by other health care providers of the same or similar specialty practicing in the community in which such care is provided. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.

The Defendants Clinton, Dille, M.D., Thomas Byrne, P.A., and Southern Idaho Pain Institute are health care providers within the meaning of this instruction.

IDJI2d 2.10.1.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 13

A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree of skill and learning ordinarily possessed and exercised by other health care providers who are trained and qualified in the same or a similar field of care and who practice in the community in which such care is to be provided. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.

The Defendants Clinton, Dille, M.D., Thomas Byrne, P.A., and Southern Idaho Pain Institute are health care providers within the meaning of this instruction.

IDJI2d 2.10.2.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 14

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

IDJI2d 1.24.2.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 15

Whether a party has insurance is not relevant to any of the questions you are to decide.

You must avoid any inference, speculation or discussion about insurance.

IDJ12d 1.04.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 16

By giving you instructions on the subject of damages, I do not express any opinion as to whether the plaintiff is entitled to damages.

IDJI2d 9.00.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 17

If the jury decides the Plaintiffs are entitled to recover from the Defendants, the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by Defendants' negligence.

The elements of damage the jury may consider are:

1. The reasonable cost of Rosalie Schmechel's funeral.
2. The reasonable value to each of the Plaintiffs of the loss of the Rosalie Schmechel's comfort, love, companionship, affections, guidance, training, services and society and the present cash value of any such loss that is reasonably certain to occur in the future, taking into consideration the life expectancy of the plaintiffs, the decedent's age and normal life expectancy, habits, disposition and any other circumstances shown by the evidence.
3. The Plaintiff Vaughn Schmechel's loss of financial support from the decedent, and the present cash value of financial support the decedent would have provided to the Plaintiffs in the future, but for the decedent's death, taking into account the plaintiff's life expectancy, the decedent's age and normal life expectancy, the decedent's earning capacity, habits, disposition and any other circumstances shown by the evidence.

Death is inevitable. Although the law compensates for the untimeliness of a death caused by another, no damages are allowed for grief or sorrow.

IDJ12d 9.05. (Modified)

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 18

When I use the phrase "present cash value" as to any damage that may accrue in the future, I mean that sum of money determined and paid now which, when invested at a reasonable rate of interest, would be sufficient to pay the future damages at the time and in the amount the future damages will be incurred.

IDJI2d 9.13.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 19

Under a standard table of mortality, the life expectancy of a female age 60 is 23.21 years. Rosalie Schmechl was 60 years of age at the time of her death. This figure is not conclusive. It is an actuarial estimate of the average probable remaining length of life based upon statistical samples of death rates and ages at death in this country. This data may be considered in connection with all other evidence relating to the probable life expectancy, including the subject's occupation, health, habits, and other activities.

IDJI2d 9.15. (Modified)

GIVEN _____
REFUSED _____
MODIFIED _____
COVERED _____
OTHER _____

INSTRUCTION NO. 20

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

[Read the verdict form in its entirety, including all instructions, and explain the signature block for the foreperson and the signature lines for the individual jurors.]

IDJI2d 1.43.1.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 21

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of negligence.

IDJI2d 1.09.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 22

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

IDJI2d 1.13.1.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 23

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

An appropriate form of verdict will be submitted to you with any instructions. Follow the directions on the verdict form, and answer all of the questions required of you by the instructions on the verdict form.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon each of the required questions in the verdict, you should fill it out as instructed, and have it signed. It is not necessary that the same nine agree on each question. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdicts, you will notify the bailiff, who will then return you into open court.

IDJI2d 1.15.2.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 24

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any means other than such a note.

During your deliberations, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

IDJI2d 1.11.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 25

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing arguments to you and then you will retire to the jury room for your deliberations.

Each of you has an equally important voice in the jury deliberations. Therefore, the attitude and conduct of jurors at the beginning of the deliberations are important. At the outset of deliberations, it is rarely productive for a juror to make an emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused and there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but you are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

IDJI2d 1.13.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

INSTRUCTION NO. 26

You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. You may now discuss this case with the attorneys or with anyone else. For your guidance, I instruct you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you want to, but you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to talk to someone about this case, you may tell them as much or as little as you like about your deliberations or the facts that influenced your decisions. If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, you may report it to me.

IDJI2d 1.17.

GIVEN	_____
REFUSED	_____
MODIFIED	_____
COVERED	_____
OTHER	_____

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

VAUGHN SCHMECHEL, individually, and
as Surviving Spouse and Personal
Representative of the Estate of ROSALIE
SCHMECHEL, deceased, and ROBERT P
LEWIS, KIM HOWARD and TAMARA
HALL, natural children of ROSALIE
SCHMECHEL, deceased,

Plaintiffs,

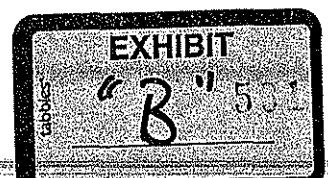
vs.

CLINTON DILLE, M.D., SOUTHERN
IDAHO PAIN INSTITUTE, an Idaho
corporation, THOMAS BYRNE, P.A., and
JOHN DOE and JANE DOE, I through X,

Defendants.

Case No. CV 05-4345

SPECIAL VERDICT FORM



We, the Jury, answer the special interrogatories as follows:

Question No. 1: Did Defendant Southern Idaho Spine Institute, by and through the actions of Defendant Clinton Dille, M.D., negligently fail to meet the standard of health care practice in this community in their treatment of Rosalie Schmechel, and if so, was this negligence a proximate cause of Rosalie Schmechel's injuries and death?

Answer to Question No. 1: Yes ☐ No ☐

Question No. 2: Did Defendant Southern Idaho Spine Institute, by and through the actions of Defendant Thomas Byrne, P.A., negligently fail to meet the standard of health care practice in this community in their treatment of Rosalie Schmechel, and if so, was this negligence a proximate cause of Rosalie Schmechel's injuries and death?

Answer to Question No. 2: Yes ☐ No ☐

If you answered "No" to each of the above two questions, do not answer any of the remaining questions and simply sign the verdict form, advising the bailiff you have concluded your deliberations; if you answered "yes" to any of the above two questions, proceed to answer Question No. 3.

You are now to compare the negligence of the parties. Insert in the answer to Question No. 3 the percentage of negligence you find attributable to each party. Your percentage must total 100 percent.

Question No. 3: Considering all of the negligence which proximately caused Rosalie Schmechel's injuries and death, we find the negligence causing Rosalie Schmechel's injuries and death in the following percentages:

a) Defendant Clinton Dille, M.D. _____%

b) Defendant Thomas Byrne, P.A. _____%

Total must equal 100%

Your answers to Question No. 3 must total 100%. Regardless of your answer, however, proceed to Question No. 4.

Question No. 4: What is the total amount of damages sustained by the Plaintiff Vaughn Schmechel?

Answer to Question No. 4: We assess Plaintiff Vaughn Schmechel's damages as follows:

1. Economic damages, as defined in the Instructions:
\$ _____;
2. Non-Economic damages, as defined in the Instructions:
\$ _____.

Question No. 5: What is the total amount of damages sustained by the Plaintiff Robert Lewis?

Answer to Question No. 5: We assess Plaintiff Robert Lewis' damages as follows:

1. Non-economic damages, as defined in the Instructions:
\$ _____.

Question No. 6: What is the total amount of damages sustained by the Plaintiff Kim Howard?

Answer to Question No. 6: We assess Plaintiff Kim Howard's damages as follows:

1. Non-economic damages, as defined in the Instructions:
\$ _____.

Question No. 7: What is the total amount of damages sustained by the Plaintiff Tamara Hall?

Answer to Question No. 7: We assess Plaintiff Tamara Hall's damages as follows:

1. Non-economic damages, as defined in the Instructions:

\$ _____.

You have now completed the verdict form and you may simply sign the verdict form and advise the bailiff you have concluded your deliberations.

DATED this _____ day of _____, 2007.

Foreperson

INSTRUCTION NO. _____

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.



INSTRUCTION NO. _____

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.
2. You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.
3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.
4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.
5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.
6. You must not go to the place where any alleged event occurred.

INSTRUCTION NO. _____

Certain evidence is about to be presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing [and upon video tape]. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear, this record will not be available to you during your deliberations.

INSTRUCTION NO. _____

In this case, Plaintiff Vaughn Schmechel claims or alleges that he suffered the wrongful death of his wife, Rosalie Schmechel, based upon the medical negligence of Defendants Clinton Dille, M.D., Thomas Byrne, P.A., and Southern Idaho Pain Institute.. It will be for you to determine whether Defendants were negligent and whether such medical negligence was a proximate cause of Rosalie Schmechel's death. As a consequence of Rosalie Schmechel's death, Vaughn Schmechel alleges he has and will suffer the loss of her love, companionship, society and financial support and he seeks to recover damages for these losses.

In addition to the claims just discussed, Plaintiffs Robert Lewis, Kim Howard and Tamara Hall claim they suffered the wrongful death of their mother, Rosalie Schmechel, based upon the medical negligence of Defendants Clinton Dille, M.D., Thomas Byrne, P.A., and Southern Idaho Pain Institute.. It will be for you to determine whether Defendants were negligent and whether such medical negligence was a proximate cause of Rosalie Schmechel's death. As a consequence of Rosalie Schmechel's death, Robert Lewis, Kim Howard and Tamara Hall allege they have and will suffer the loss of her love, companionship, and society and they seek to recover damages for these losses.

INSTRUCTION NO. _____

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

INSTRUCTION NO. _____

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit

or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

[There were occasions where an objection was made after an answer was given or the remark was made, and in my ruling on the objection I instructed that the answer or remark be stricken, or directed that you disregard the answer or remark and dismiss it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.]

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

INSTRUCTION NO. _____

On the claim of medical negligence against the Defendant Clinton Dille, M.D., Thomas Byrne, P.A., and Southern Idaho Pain Institute, for the death of Rosalie Schmechel, Plaintiffs have the burden of proof on each of the following propositions:

1. That Defendants failed to meet the applicable standard of care as defined in these instructions;
2. That Rosalie Schmechel was injured;
3. That the acts of Defendants which failed to meet the applicable standard of care were a proximate cause of the injuries to and the death of Rosalie Schmechel; and
4. The elements of damage and the amount thereof.

INSTRUCTION NO. _____

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

INSTRUCTION NO. _____

When I use the expression "proximate cause," I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

INSTRUCTION NO. _____

Thomas Byrne, P.A., who was involved in the care of Rosalie Schmechel was an employee of Southern Idaho Pain Institute at the time of the occurrence. Therefore, you are instructed any act or omission of Thomas Byrne, P.A... in his care of Rosalie Schmechel was the act or omission of the Defendant Southern Idaho Pain Institute.

INSTRUCTION NO. _____

Clinton Dille, M.D., who was involved in the care of Rosalie Schmechel was an employee of Southern Idaho Pain Institute at the time of the occurrence. Therefore, you are instructed any act or omission of Clinton Dille, M.D.. in his care of Rosalie Schmechel was the act or omission of the Defendant Southern Idaho Pain Institute.

INSTRUCTION NO. _____

A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree of skill and learning ordinarily possessed and exercised by other health care providers of the same or similar specialty practicing in the community in which such care is provided. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.

The Defendants Clinton, Dille, M.D., Thomas Byrne, P.A., and Southern Idaho Pain Institute are health care providers within the meaning of this instruction.

INSTRUCTION NO. _____

A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree of skill and learning ordinarily possessed and exercised by other health care providers who are trained and qualified in the same or a similar field of care and who practice in the community in which such care is to be provided. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.

The Defendants Clinton, Dille, M.D., Thomas Byrne, P.A., and Southern Idaho Pain Institute are health care providers within the meaning of this instruction.

INSTRUCTION NO. _____

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

INSTRUCTION NO. _____

Whether a party has insurance is not relevant to any of the questions you are to decide.

You must avoid any inference, speculation or discussion about insurance.

INSTRUCTION NO. _____

By giving you instructions on the subject of damages, I do not express any opinion as to whether the plaintiff is entitled to damages.

INSTRUCTION NO. _____

If the jury decides the Plaintiffs are entitled to recover from the Defendants, the jury must determine the amount of money that will reasonably and fairly compensate the Plaintiffs for any damages proved to be proximately caused by Defendants' negligence.

The elements of damage the jury may consider are:

1. The reasonable cost of Rosalie Schmechel's funeral.
2. The reasonable value to each of the Plaintiffs of the loss of the Rosalie Schmechel's comfort, love, companionship, affections, guidance, training, services and society and the present cash value of any such loss that is reasonably certain to occur in the future, taking into consideration the life expectancy of the plaintiffs, the decedent's age and normal life expectancy, habits, disposition and any other circumstances shown by the evidence.
3. The Plaintiff Vaughn Schmechel's loss of financial support from the decedent, and the present cash value of financial support the decedent would have provided to the Plaintiffs in the future, but for the decedent's death, taking into account the plaintiff's life expectancy, the decedent's age and normal life expectancy, the decedent's earning capacity, habits, disposition and any other circumstances shown by the evidence.

Death is inevitable. Although the law compensates for the untimeliness of a death caused by another, no damages are allowed for grief or sorrow.

INSTRUCTION NO. _____

When I use the phrase "present cash value" as to any damage that may accrue in the future, I mean that sum of money determined and paid now which, when invested at a reasonable rate of interest, would be sufficient to pay the future damages at the time and in the amount the future damages will be incurred.

INSTRUCTION NO. _____

Under a standard table of mortality, the life expectancy of a female age 60 is 23.21 years. Rosalie Schmechl was 60 years of age at the time of her death. This figure is not conclusive. It is an actuarial estimate of the average probable remaining length of life based upon statistical samples of death rates and ages at death in this country. This data may be considered in connection with all other evidence relating to the probable life expectancy, including the subject's occupation, health, habits, and other activities.

INSTRUCTION NO. _____

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

[Read the verdict form in its entirety, including all instructions, and explain the signature block for the foreperson and the signature lines for the individual jurors.]

INSTRUCTION NO. _____

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of negligence.

INSTRUCTION NO. _____

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

INSTRUCTION NO. _____

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

An appropriate form of verdict will be submitted to you with any instructions. Follow the directions on the verdict form, and answer all of the questions required of you by the instructions on the verdict form.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon each of the required questions in the verdict, you should fill it out as instructed, and have it signed. It is not necessary that the same nine agree on each question. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdicts, you will notify the bailiff, who will then return you into open court.

INSTRUCTION NO. _____

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any means other than such a note.

During your deliberations, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

INSTRUCTION NO. _____

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing arguments to you and then you will retire to the jury room for your deliberations.

Each of you has an equally important voice in the jury deliberations. Therefore, the attitude and conduct of jurors at the beginning of the deliberations are important. At the outset of deliberations, it is rarely productive for a juror to make an emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused and there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but you are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

INSTRUCTION NO. _____

You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. You may now discuss this case with the attorneys or with anyone else. For your guidance, I instruct you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you want to, but you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to talk to someone about this case, you may tell them as much or as little as you like about your deliberations or the facts that influenced your decisions. If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, you may report it to me.

DISTRICT COURT
TWIN FALLS CO., IDAHO
FILED

2007 OCT -9 PM 4:50

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DEPUTY

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Attorneys for Defendant Thomas J. Byrne

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

ORIGINAL

VAUGHN SCHMECHEL, individually,
and as Surviving Spouse and Personal
Representative of the Estate of ROSALIE
SCHMECHEL, deceased, and ROBERT P.
LEWIS, KIM HOWARD and TAMARA
HALL natural children of ROSALIE
SCHMECHEL, deceased,

Plaintiffs,

vs.

CLINTON DILLE, M.D., SOUTHERN
IDAHO PAIN INSTITUTE, an Idaho
corporation, THOMAS BYRNE, P.A. and
JOHN DOE, I through X,

Defendants.

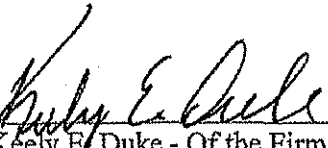
Case No. CV-05-4345

**DEFENDANT THOMAS J. BYRNE,
P.A.'S PROPOSED JURY
INSTRUCTIONS**

Attached are defendant Thomas J. Byrne, P.A.'s proposed jury instructions.

DATED this 9th day of October, 2007.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By 
Keely E. Duke - Of the Firm
Attorneys for Defendant Thomas J. Byrne

CERTIFICATE OF SERVICE

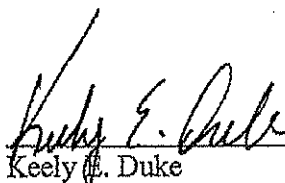
I HEREBY CERTIFY that on the 9th day of October, 2007, I caused to be served a true copy of the foregoing, by the method indicated below, and addressed to each of the following:

David Cornstock
Law Offices of Cornstock & Bush
199 N. Capitol Blvd., Ste. 500
P.O. Box 2774
Boise, Idaho 83701
Attorney for Plaintiffs
Fax No.: (208) 344-7721

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy

Steven J. Hippler
GIVENS PURSLEY
601 W. Bannock ST.
PO Box 2720
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*Attorneys for Clinton Dille, M.D. and
Southern Idaho Pain Institute*
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☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy


Keely L. Duke

INSTRUCTION NO. _____

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

There were occasions where an objection was made after an answer was given or the remark was made, and in my ruling on the objection I instructed that the answer or remark be

stricken, or directed that you disregard the answer or remark and dismiss it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives. There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

INSTRUCTION NO. _____

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.
2. You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.
3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.
4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.
5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.

INSTRUCTION NO. _____

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

INSTRUCTION NO. _____

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of negligence.

INSTRUCTION NO. _____

Whether a party has insurance is not relevant to any of the questions you are to decide.

You must avoid any inference, speculation or discussion about insurance.

INSTRUCTION NO. _____

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

INSTRUCTION NO. _____

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

INSTRUCTION NO. _____

On September 26, 2003, Rosalie Schmechel sought treatment for her chronic pain from the defendant Southern Idaho Pain Institute. Defendant Thomas J. Byrne was a physician assistant employed by the Southern Idaho Pain Institute working under the supervision of defendant Clinton Dillé, M.D. Mr. Byrne examined Mrs. Schmechel on September 26, 2003 and, among other things, started Mrs. Schmechel on a new pain medication, Methadone. On September 29, 2003, Mr. Byrne discussed his care and treatment of Mrs. Schmechel with Dr. Dillé. Dr. Dillé agreed with and approved Mr. Byrne's treatment plan for Mrs. Schmechel.

On October 2, 2003, Mrs. Schmechel passed away. Plaintiffs allege that Mrs. Schmechel passed away as a result of the care and treatment provided to her by defendants Dr. Dillé, the Southern Idaho Pain Institute, and Mr. Byrne

INSTRUCTION NO. _____

Certain evidence was presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony taken by deposition, this record will not be available to you during your deliberations.

INSTRUCTION NO. _____

In this case, certain evidence was admitted for a limited purpose. I called your attention to this when the evidence was admitted. I remind you that whenever evidence was admitted for a limited purpose, you must not consider such evidence for any purpose other than the limited purpose for which it was admitted.

INSTRUCTION NO. _____

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

INSTRUCTION NO. _____

On the claim of medical negligence against Dr. Dillé for failure to meet the standard of care, the plaintiffs have the burden of proof on each of the following propositions:

1. Dr. Dillé failed to meet the applicable standard of care as defined in these instructions;

2. That the plaintiffs were injured;

3. That the acts of the Dr. Dillé which failed to meet the applicable standard of care were a proximate cause of the injuries of the plaintiffs and

4. The elements of damage and the amount thereof.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiffs; however, if you find that any one or more of these propositions has not been proved, then the plaintiffs have not met the burden of proof required and your verdict should be for Dr. Dillé.

INSTRUCTION NO. _____

On the claim of medical negligence against Thomas J. Byrne for failure to meet the standard of care, the plaintiffs have the burden of proof on each of the following propositions:

1. Mr. Byrne failed to meet the applicable standard of care as defined in these instructions;
2. That the plaintiffs were injured;
3. That the acts of Mr. Byrne which failed to meet the applicable standard of care were a proximate cause of the injuries of the plaintiffs; and
4. The elements of damage and the amount thereof.

If you find from your consideration of all the evidence that each of these propositions has been proven, your verdict should be for the plaintiffs; however, if you find that any one or more of these propositions has not been proven, then the plaintiffs have not met the burden of proof required and your verdict should be for Mr. Byrne.

INSTRUCTION NO. _____

In determining whether Dr. Dillé's conduct satisfied the applicable standard of practice as it has been stated to you, you are not permitted to set up arbitrarily a standard of your own. You must determine the applicable standard of practice required of Dr. Dille and any breach thereof only from the testimony of those persons, including Dr. Dille, who have testified as expert witnesses as to such standard in this case.

INSTRUCTION NO. _____

In determining whether Mr. Byrne's conduct satisfied the applicable standard of practice as it has been stated to you, you are not permitted arbitrarily to set up a standard of your own. You must determine the applicable standard of practice required of Mr. Byrne and any breach thereof only from the testimony of those persons, including Mr. Byrne, who have testified as expert witnesses as to such standard in this case.

INSTRUCTION NO. _____

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence.

INSTRUCTION NO. _____

To prove that Dr. Dillé was "negligent," the plaintiffs must prove, by direct expert testimony and by a preponderance of all of the competent evidence, that Dr. Dillé failed to meet the standard of health care practice in Twin Falls, Idaho, as such standard existed from September 26, 2003 through October 2, 2003, with respect to the class of health care provider to which Dr. Dillé belonged and in which he was functioning; here, a board certified anesthesiologist specializing in pain management.

A doctor such as Dr. Dillé, shall be judged in comparison with similarly trained and qualified doctors in the same community taking into account his training, experience and field of specialization.

INSTRUCTION NO. _____

To prove that Mr. Byrne was "negligent," the plaintiffs must prove, by direct expert testimony and by a preponderance of all of the competent evidence, that Mr. Byrne failed to meet the standard of health care practice in Twin Falls, Idaho, as such standard existed from September 26, 2003 through October 2, 2003, with respect to the class of health care provider to which Mr. Byrne belonged and in which he was functioning; here, a physician assistant.

A physician assistant, such as Mr. Byrne, shall be judged in comparison with similarly trained and qualified physician assistants in the same community taking into account his training, experience and field of specialization.

INSTRUCTION NO. _____

A plaintiff in a medical malpractice action is required to prove a breach of the community standard of care. The mere fact that an undesirable or unfortunate result occurs following medical care rendered by a defendant does not, by itself, establish a breach of the standard of care by the defendant.

INSTRUCTION NO. _____

In determining whether a defendant medical provider such as Dr. Dillé or Mr. Byrne has failed to meet the appropriate standards of health care required of each of them in treating a patient, their judgment must be considered in light of all the facts and circumstances with which each was confronted at the time. Medical providers such as Dr. Dillé or Mr. Byrne are not to be judged by after-acquired knowledge or by the results of their treatment; the test is not what hindsight may reveal should have been done in light of subsequently occurring conditions.

INSTRUCTION NO. _____

You have heard from the expert witnesses who have testified in this case with differing views as to what would be the appropriate standards to be followed by a board certified anesthesiologist specializing in pain management providing medical care under the circumstances presented here. If you find from these opinions that two or more alternative courses of action would be recognized by the profession as proper and that Dr. Dillé chose one of those courses of action, then a verdict should be returned in favor of Dr. Dillé.

INSTRUCTION NO. _____

You have heard from the expert witnesses who have testified in this case with differing views as to what would be the appropriate standards to be followed by a physician assistant providing medical care under the circumstances presented here. If you find from these opinions that two or more alternative courses of action would be recognized by the profession as proper and that Mr. Byrne chose one of those courses of action, then a verdict should be returned in favor of Mr. Byrne.

INSTRUCTION NO. _____

If plaintiffs prove that Dr. Dillé failed to meet the applicable standard of care, plaintiffs have the additional burden of proving through expert testimony that his failure to meet the applicable standard of care was, to a reasonable degree of medical certainty, the proximate cause of plaintiffs' injuries.

INSTRUCTION NO. _____

If plaintiffs prove that Mr. Byrne failed to meet the applicable standard of care, plaintiffs have the additional burden of proving through expert testimony that his failure to meet the applicable standard of care was, to a reasonable degree of medical certainty, the proximate cause of plaintiffs' injuries.

INSTRUCTION NO. _____

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

INSTRUCTION NO. _____

By giving you instructions on the subject of damages, I do not express any opinion as to whether the plaintiffs are entitled to damages.

INSTRUCTION NO. _____

If the jury decides the plaintiffs are entitled to recover from the defendants, the jury must determine the amount of money that will reasonably and fairly compensate the plaintiffs for any damages proved to be proximately caused by defendants' negligence.

The elements of damage the jury may consider are:

1. The reasonable value to the plaintiffs of the loss of Mrs. Schmechel's services, training, comfort, conjugal relationship and society and the present cash value of any such loss that is reasonably certain to occur in the future, taking into consideration the life expectancy of the plaintiffs, Mrs. Schmechel's age and normal life expectancy, habits, disposition and any other circumstances shown by the evidence.

Death is inevitable. Although the law compensates for the untimeliness of a death caused by another, no damages are allowed for grief or sorrow.

INSTRUCTION NO. _____

You are instructed that if you find plaintiffs are entitled to damages, then you must only award such damages that have been proved by plaintiffs with reasonable certainty.

You are not permitted to award speculative damages, which means compensation for future loss or harm which, although possible, is conjectural or not reasonably certain to occur in the future.

INSTRUCTION NO. _____

When I use the phrase "present cash value" as to any damage that may accrue in the future, I mean that sum of money determined and paid now which, when invested at a reasonable rate of interest, would be sufficient to pay the future damages at the time and in the amount the future damages will be incurred.

INSTRUCTION NO. _____

A person who has a preexisting condition or disability is entitled to recover damages for the aggravation of such preexisting condition, if any, that is proximately caused by the occurrence. The person is not entitled to recover damages for the preexisting condition or disability itself.

If you find that before the occurrence causing the injuries in this case that Rosalie Schmechel had a preexisting bodily condition or disability, and further find that because of the new occurrence in this case the preexisting condition or disability was aggravated, then you should consider the aggravation of the condition or disability in fixing the damages in this case. You should not consider any condition or disability that existed prior to the occurrence, or any aggravation of such condition that was not caused or contributed to by reason of this occurrence.

You are to apportion, if possible, between the condition or disability prior to this occurrence and the condition or disability caused by this occurrence, and assess liability accordingly. If no apportionment can reasonably be made by you, then the defendants are liable for the entire damage.

INSTRUCTION NO. _____

In deciding the issue of damages, you are not to consider whether there are any tax consequences associated with an award of damages.

INSTRUCTION NO. _____

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing arguments to you and then you will retire to the jury room for your deliberations.

Each of you has an equally important voice in the jury deliberations. Therefore, the attitude and conduct of jurors at the beginning of the deliberations are important. At the outset of deliberations, it is rarely productive for a juror to make an emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused and there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but you are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

INSTRUCTION NO. _____

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

An appropriate form of verdict will be submitted to you with any instructions. Follow the directions on the verdict form, and answer all of the questions required of you by the instructions on the verdict form.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon each of the required questions in the verdict, you should fill it out as instructed, and have it signed. It is not necessary that the same nine agree on each question. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdicts, you will notify the bailiff, who will then return you into open court.

INSTRUCTION NO. _____

In this case, you will return a Special Verdict consisting of a series of questions. In answering a question, you must be persuaded, considering all of the evidence in this case, that your choice of answer is more probably true than not true. Because the explanation on the form which you will have is part of my instructions to you, I will read the verdict form to you and explain it. It states:

We, the Jury, answer the special interrogatory as follows:

Question No. 1: Did defendant Clinton Dillé, M.D., negligently fail to meet the applicable standard of health care practice in his treatment and care of Rosalie Schmechel?

Answer to Question No. 1: Yes ☐ No ☐

If you answered "No" to Question No. 1, then do not answer Question No. 2 and proceed directly to Question No. 3.

If you answered "Yes" to Question No. 1, then answer Question No. 2.

Question No. 2: Was Dr. Dillé's negligence a proximate cause of Mrs. Schmechel's death?

Answer to Question No. 2: Yes ☐ No ☐

Please answer Question No. 3.

Question No. 3: Did defendant Thomas J. Byrne negligently fail to meet the applicable standard of health care practice in his treatment and care of Rosalie Schmechel?

Answer to Question No. 3: Yes ☐ No ☐

If your answers to Questions No. 1 and 3 were "No" you are finished. Please sign the verdict form and tell the bailiff that you are finished. If you answered "Yes" to Question No. 3, then answer Question No. 4.

Question No. 4: Was Mr. Byrne's negligence a proximate cause of Mrs. Schmechel's death?

Answer to Question No. 4: Yes [] No []

If your answers to Questions No. 2 and 4 were "No" you are finished. Please sign the verdict form and tell the bailiff that you are finished. If you answered "Yes" to Question No. 2 or Question No. 4 please answer the next question.

Instruction for Question No. 5: You will reach this question if you have found that either defendants Dr. Dillé or Mr. Byrne were negligent, which negligence caused the death of Mrs. Schmechel. In this question, you are to apportion the fault between the parties in terms of a percentage. As to each party or entity to which you answered "Yes" to Questions No. 2 and 4, determine the percentage of fault for that party or entity, and enter the percentage on the appropriate line. If you answered "No" to any of the above questions, insert a "0" or "Zero" as to that party or entity. Your total percentages must equal 100%.

Question No. 5: What is the percentage of fault (if any) you assign to each of the following:

Answer to Question No. 5:

To the Defendant, Clinton Dillé, M.D. %

To the Defendant, Thomas J. Byrne %

Total must equal 100%

Please answer Question 6.

Question No. 6: What is the total amount of economic damages, if any, sustained by Vaughn Schmechel?

Answer to Question No. 6: \$

Question No. 7: What is the total amount of non-economic damages, if any, sustained by plaintiffs?

Answer to Question No. 7:

Vaughn Schmechel \$

Robert Lewis

\$ _____

Kim Howard

\$ _____

Tamara Hall

\$ _____

Steven J. Hippler ISB #4388
J. Will Varin ISB #6981
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DISTRICT COURT
TWIN FALLS CO., IDAHO
FILED

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DEPUTY

Attorneys for Defendants, Clinton Dillé, M.D. and Southern Idaho Pain Institute

IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

VAUGHN SCHMECHEL, Individually, and
as Surviving Spouse and Personal
Representative of the Estate of ROSALIE
SCHMECHEL, deceased, and ROBERT
P. LEWIS, KIM HOWARD and TAMARA
HALL, natural children of ROSALIE
SCHMECHEL, deceased,

Plaintiffs,

Vs.

CLINTON DILLÉ, M.D., SOUTHERN
IDAHO PAIN INSTITUTE, an Idaho
corporation, THOMAS BYRNE, P.A., and
JOHN DOE and JANE DOE, I through X,

Defendants.

Case No. CV 05 4345

ORIGINAL

**DEFENDANT CLINTON DILLÉ, M.D.
AND SOUTHERN IDAHO PAIN
INSTITUTE'S TRIAL BRIEF**

I. INTRODUCTION

This case arises out of the death of Rosalie Schmechel in October 2003. Plaintiffs allege Defendants' negligence in prescribing certain pain medication to Mrs. Schmechel caused or contributed to her death. This Trial Brief outlines the underlying facts of this case and provides Dr. Dillé and the Southern Idaho Pain Institute's (the "Defendants")

analysis of the legal issues anticipated at trial and the prima facie elements of Plaintiffs' claim for medical malpractice.

II. FACTUAL BACKGROUND

Mrs. Schmechel had a long history of back problems and severe back and leg pain, including multiple surgical interventions. Kimberly Vorse, M.D. a pain medicine physician in Sun Valley, Idaho, had treated Mrs. Schmechel for pain management related issues for a number of years. She had also begun to treat Mrs. Schmechel for sleep related health issues. For years prior to 2003, Mrs. Schmechel went to the Southern Idaho Pain Institute, Dr. Vorse had prescribed Mrs. Schmechel amitriptyline for sleep problems and Oxycontin as a long acting pain medication together with Hydrocodone (Vicodin) for break through pain.

In addition, Mrs. Schmechel was receiving medications from her primary care physician, Dr. Harris, including medication for high blood pressure and diuretics for lower leg edema of which she had complained for some time. She also received prescription NSAIDs (Bextra) both from Dr. Vorse and Dr. Harris. In 2001, Mrs. Schmechel had a sleep study, per Dr. Vorse, and was ultimately diagnosed with obstructive sleep apnea and prescribed C-pap therapy for the sleep apnea.

In mid to late 2003, Mrs. Schmechel allegedly decided that she was tired of traveling to Sun Valley from Twin Falls for her monthly visit with Dr. Vorse for medical check ups and to obtain medication refills. Dr. Harris referred her to Southern Idaho Pain Institute, in Twin Falls for evaluation and pain management.

Mrs. Schmechel then made an appointment with Southern Idaho Pain Institute and presented to Southern Idaho Pain Institute on, Friday, September 26, 2003. She saw Physician's Assistant, Thomas Byrne, who reviewed Mrs. Schmechel's medical

history with her and performed a physical examination. During this initial visit, Mr. Byrne confirmed Mrs. Schmechel felt her pain was very poorly controlled. Mr. Byrne also noted Mrs. Schmechel's pain was severe enough to limit her activities and daily life. In his written evaluation, Mr. Byrne noted the other medical conditions Mrs. Schmechel had not identified in the written history she had provided, including the history of chronic sleep apnea and her use of C-pap. He confirmed with her that she was compliant with her use of C-pap and that she was tolerating it well. In talking to her, Mr. Byrne found her to be a good historian concerning her health and felt comfortable with her description of her health issues.

Mr. Byrne had a long discussion with Mrs. Schmechel during this initial visit about her pain care regime, Mrs. Schmechel's desire to try something different, and what could be done to improve her current pain problems. In essence, Mr. Byrne found Mrs. Schmechel's pain was not adequately controlled with her current pain medications and the pain was unreasonably interfering with her life, and that Mrs. Schmechel was ready to try a different long acting pain medication.

Accordingly, Mr. Byrne discussed with Mrs. Schmechel the possibility of changing pain medications to provide better pain control. A patient who has been on the same pain medication for a period of time, despite increasing doses, may not continue to receive the same level of pain relief and changing pain medications can provide could provide beneficial pain relief. Accordingly, Mr. Byrne discussed with Mrs. Schmechel changing from Oxycontin to Methadone as a long-acting narcotic and making a slight alteration in how she used Hydrocodone for break through pain.

Mr. Byrne spent a great deal of time with Mrs. Schmechel explaining how Methadone works in the body in that it is metabolized slowly and over a substantial period of time. He also stressed the importance of taking only the amount prescribed, and that taking amounts in excess of what was prescribed could cause severe problems, including the potential for death. He explained how the Methadone could build up in her body and could "sneak up" on her and that misuse of the drug could be very dangerous, even fatal. He discussed symptoms of overmedication, including sleepiness, nausea, over sedation, lack of clear mental thought and other potential symptoms.

After the discussion with Mr. Byrne, Mrs. Schmechel decided she wanted to try Methadone. Accordingly, Mr. Byrne gave clear verbal instructions regarding doses and a written note summarizing the general plan for dosing, including the maximum doses she could take.

Mr. Byrne also continued to provide Mrs. Schmechel with a short-acting narcotic, Narco (also commonly referred to as Hydrocodone or Vicodin), and explained that when she was having break through pain, she should not take more Methadone but should rely on the Hydrocodone. Mr. Byrne increased Mrs. Schmechel's Hydrocodone dose from 7.5 milligrams per tablet (Vicodin) to 10 milligrams per tablet (Norco), but limited the frequency with which she was to take the medication, for a net result of little to no increase in Mrs. Schmechel's daily Hydrocodone dose. Mrs. Schmechel was advised to contact Mr. Byrne or the clinic should she have any problems with any of the medications or had any other questions or concerns. Mr. Byrne also instructed her to

reduce her doses of amitriptylene because it did not appear to be providing any significant relief and presented additional risks of sedation and other problems.

On Sunday evening, September 28th, Mr. Byrne called Mrs. Schmechel at home to check on her transition to the new pain care regimen. She indicated she was doing well and not having any adverse reactions or side effects. Mr. Byrne dictated a note to the chart to this effect, and indicated in his note that he gave her additional instructions regarding dosing that she could take of the Methadone.

Mr. Byrne also instructed Mrs. Schmechel to call him the next day. Also on the next day, Mr. Byrne discussed Mrs. Schmechel's care with Dr. Dillè and briefly reviewed with him Mrs. Schmechel's history and his decision to change her long acting opioid from Oxycontin to Methadone.

As instructed, Mrs. Schmechel called Mr. Byrne that next day, and again reported no problems. In fact, Mrs. Schmechel said she was doing better. Based upon this report and the apparent fact Mrs. Schmechel was tolerating the Methadone well, Mr. Byrne instructed Mrs. Schmechel she could take up to the full strength dose of Methadone he had previously instructed her about. He told her to not take more than that amount, to minimize the amount of Hydrocodone she was taking, and to not alter her medications without instructions from him or Dr. Dillè. Mr. Byrne again instructed her to call with any problems or concerns and, in any event, to check in by phone the following Monday. She was also scheduled to see Dr. Dillè in two weeks from her initial appointment.

On October 2, 2003, when Mr. Schmechel awoke and left for work, he noted Mrs. Schmechel sleeping on the couch, where she typically slept. He left for work and did not return until evening.

Robert Lewis, Mrs. Schmechel's son, went to the Schmechel's residence in the late afternoon on October 2, 2003 after Mrs. Schmechel failed to answer phone calls to the residence and found Mrs. Schmechel had passed away sometime during that day.

III. PLAINTIFFS' PRIMA FACIE CASE

A. Plaintiffs' Claim of Medical Negligence.

1. Elements of the prima facie case – generally.

In this matter, Plaintiffs seek to hold Mr. Byrne and Dr. Dillè liable for medical negligence. Plaintiffs also seek to hold the Southern Idaho Pain Institute (an Idaho corporation) vicariously liable for Mr. Byrne's and Dr. Dillè's care of Mrs. Schmechel. Defendants do not dispute that Mr. Byrne and Dr. Dillè were Southern Idaho Pain Institute employees.

To prove medical negligence, Plaintiffs must establish the following basic elements: (1) the existence of a physician-patient relationship; (2) a duty of care, recognized by law, requiring the physician to conform to a certain standard of conduct; (3) a breach of that duty (i.e., conduct which fails to meet the applicable standard of care); (4) actual loss or damage. *Anderson v. Hollingsworth*, 136 Idaho 800, 41 P.3d 228 (2001); *Swallow v. Emergency Medicine of Idaho, P.A.*, 138 Idaho 589, 67 P.3d 68 (2003); and that such breach was the proximate cause of the plaintiffs damages. Absent such evidence, the Defendants are entitled to a directed verdict.

As a general rule, a healthcare provider may not be held liable for medical malpractice unless the plaintiff can provide, through expert testimony, the provider failed

to exercise the care and skill ordinarily exercised by similarly trained health care practitioners in the community in which the practitioner practices. See Idaho Code §§ 6-1012 and 6-1013; see also *Swallow*, 138 Idaho 589, 67 P.3d 68; *Dulaney v. Saint Alphonsus Medical Center, et al.*, 137 Idaho 160, 45 P.3d 816 (2002).

2. Duty - Applicable Standard of Care.

The purpose of Idaho Code §§ 6-1012 and 6-1013, the Legislation governing medical malpractice is stated as follows:

It is the declaration of the legislature that appropriate measures are required in the public interest to assure that a liability insurance market be available to physicians, hospitals, and other health care providers in this state and that the same be available at a reasonable cost, thus assuring the availability of such health care providers for the provision of care to persons in the state. It is, therefore, further declared to be in the public interest that the liability exposure of such health care providers be limited and made more definable by a requirement for direct proof of departure from a community standard of practice.

Statement of Purpose, 1976 Idaho Sess. Laws, ch. 277, § 1 (emphasis added).

3. The Local Community Standard of Care Controls.

Idaho Code §§ 6-1012 and 6-1013 expressly set forth the standard of care for medical malpractice actions and state the type of evidence which must be used to establish that standard. Idaho Code § 6-1012 states:

Proof of Community Standard of Health Care Practice in Malpractice Case. -

In any case, claim, or action for damages due to injury to or death of another person, brought against any physician and surgeon or other provider of health care, including without limitation any . . . nurse practitioner, registered nurse, . . . hospital . . . or any person vicariously liable for the negligence of them or any of them, on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which

such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belong to and in which capacity he, she or it was functioning. Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. If there be no other like provider in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered. As used in this act, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.

Idaho Code § 6-1012 (emphasis added).

The Idaho Supreme Court has consistently upheld the local, rather than a national, standard of care set forth in Idaho Code § 6-1012. *Gubler v. Boe*, 120 Idaho 294, 815 P.2d 1034 (1991); see e.g., *Strode v. Lenzi*, 116 Idaho 214, 775 P.2d 106 (1989); *Dekker v. Magic Valley Regional Medical Ctr.*, 115 Idaho 332, 766 P.2d 1213 (1988).

In *LePelley v. Grefenson*, 101 Idaho 422, 614 P.2d 962 (1980), the court noted that the local standard requirement recognizes there may be a difference between practices from one area to another, or distances with regard to training and the availability of medical resources. Even for board-certified physicians, it is the local rather than the national standard which must be used. *Gubler, supra*; *Strode v. Lenzi, supra*; *Dekker, supra*; *Grimes v. Green, supra*. See also *Maxwell v. Women's Clinic, P.A.* 102 Idaho 53, 625 P.2d 407 (1981); *Hall v. Bacon*, 93 Idaho 1, 453 P.2d 816 (1969); *Davis v. Potter*, 51 Idaho 81, 2 P.2d 318 (1931). Accordingly, in this case, Plaintiffs bear the burden of establishing the local standard of care applicable to both a physician's assistant and an anesthesiologist practicing in Twin Falls, Idaho in 2003.

4. Expert testimony is required to establish the applicable standard of care.

Idaho law requires the applicable standard of care be established through expert testimony. Section 6-1013 of the Idaho Code provides, in pertinent part, as follows:

The applicable standard of practice and such a defendant's failure to meet said standard must be established in such cases by such a plaintiff by testimony of one (1) or more knowledgeable, competent expert witnesses, and such expert testimony may only be admitted in evidence if the foundation therefore is first laid, establishing (a) that such an opinion is actually held by the expert witness, (b) that said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed; provided, this section shall not be construed to prohibit or otherwise preclude a competent expert witness who resides elsewhere from adequately familiarizing himself with the standards and practices of (a particular) such area and thereafter giving opinion testimony in such a trial.

Idaho Code § 6-1013 (emphasis added).

The Idaho Supreme Court has repeatedly affirmed this statutory requirement of expert testimony establishing the standard of care applicable to a defendant health care provider. See *Swallow, supra*; *Dulaney, supra*; *Strode, supra*; *Dekker, supra*; *Frank, supra*. In fact, the Idaho Supreme Court has held that in order for a plaintiff to present expert testimony indicating the defendant health care provider negligently failed to meet the applicable standard of health care practice, the plaintiff must first lay the foundation required by Idaho Code § 6-1013. *Dulaney* at 164, 45 P.3d at 820. The *Dulaney* court further held:

In order for such expert testimony to be admissible, the plaintiff must lay the foundation required by Idaho Code § 6-1013. To do so, the plaintiff must offer evidence showing: (a) that such opinion is actually held by the expert witness; (b) that the expert witness can testify to the opinion with a reasonable degree of medical certainty; (c) that the expert witness possesses professional knowledge and expertise; and (d) that the expert witness has actual knowledge of the applicable community standard of care to which his expert opinion testimony is addressed. *Morris ex rel.*

Morris v. Thomson, 130 Idaho 138, 937 P.2d 1212 (1997); *Roadhouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994); *Dunlap ex rel. Dunlap v. Garner*, 127 Idaho 599, 903 P.2d 1296 (1994).

The applicable community standard of care is defined in Idaho Code § 6-1012. It is: (a) the standard of care for the class of health care provider to which the defendant belonged and was functioning, taking into account the defendant's training, experience, and fields of medical specialization, if any; *Kolhn v. St. Luke's Regional Medical Center*, 130 Idaho 323, 940 P.2d 1142 (1997); *Evans v. Griswold*, 129 Idaho 902, 935 P.2d 165 (1997); (b) as such standard existed at the time of the defendant's alleged negligence; *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 995 P.2d 816 (2000); *Watts v. Lynn*, 125 Idaho 341, 870 P.2d 1300 (1994); *Gubler v. Boe*, 120 Idaho 294, 815 P.2d 1034 (1991); and (c) as such standard existed at the place of the defendant's alleged negligence. *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 995 P.2d 816 (2000); *Watts v. Lynn*, 125 Idaho 341, 870 P.2d 1300 (1994); *Gubler v. Boe*, 120 Idaho 294, 815 P.2d 1034 (1991).

....

An expert testifying as to the standard of care in medical malpractice actions must show that he or she is familiar with the standard of care for the particular health care professional for the relevant community and time. *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 995 P.2d 816 (2000); *Roadhouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994). The expert must also state how he or she became familiar with that standard of care. *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 995 P.2d 816 (2000); *Roadhouse v. Stutts*, 125 Idaho 208, 868 P.2d 1224 (1994).

Dulaney, 137 Idaho at 164, 45 P.3d at 820.

Accordingly, it is well established (and has been consistently reaffirmed by the Idaho Supreme Court) that under Idaho law, a plaintiff must establish, by competent expert testimony, the applicable standard of care (a standard of care that is time, site and specialty specific) and the defendants' failure to meet that standard of care. *Id.* As noted above, such expert testimony can be admitted only after a foundation is laid, establishing the expert has special expertise, the expert has actual knowledge of the applicable community standard, the expert actually has an opinion regarding the breach

of the applicable standard, and that such opinion can be provided with reasonable medical certainty. *Id.*

B. Breach of Duty.

The plaintiff in a medical malpractice action is required by statute and case law to prove a breach of the applicable community standard of care. Idaho Code § 6-1013; *Pearson, supra*. As with the other prima facie elements, plaintiffs must establish this element through competent expert testimony. *Id.* The mere fact that an undesirable or unfortunate result occurs following medical care rendered by the defendant does not, of itself, establish a breach of the standard of care. *Kolln v. Saint Luke's Regional Medical Center*, 130 Idaho 323, 940 P.2d 1142 (1997); see also *Crawford v. Anagnostopoulos*, 387 N.E. 2d 1064 (Ill. 1st Dist. 1979); G. Douthwalte, *Alexander's Jury Instructions on Medical Issues* § 3-36 at 129 (1987).

If a liability could be predicated on a perceived "bad" result, without more, strict liability – rather than negligence – would be the standard. Medical practitioners, however, are not insurers of the correctness of their diagnoses or treatment. *Willis v. Western Hosp. Ass'n.*, 67 Idaho 435, 182 P.2d 950 (1947); *Bolton v. Pfingst*, 524 S.W. 2d 786, 789 (Ky. 1975). Medicine is not a perfect or exact science and its practitioners are only required to use their best judgment. Infallibility is not and has never been the rule in Idaho or elsewhere.

Thus, in this case, Plaintiffs must show more than the fact that Mrs. Schmechel passed away following treatment by Mr. Byrne at the Southern Idaho Pain Institute. They must show Defendants failed to meet the local standard of care in their treatment of Mrs. Schmechel.

C. Causation.

In addition to the above elements, Plaintiffs must also prove with a reasonable degree of medical certainty that Mrs. Schmechel's death was proximately caused by some act or omission on Mr. Byrne's or Dr. Dillé's part. See generally, I.C. § 6-1013. Expert testimony is required to establish causation in a medical malpractice case. *Swallow, supra; Le Pelley, supra*. Such expert testimony is required because the causative factors involved with medical issues are typically outside the competence of the jury. *Swallow, supra; Le Pelley, supra; Evans, supra*.

In *Swallow*, the court cited with approval *Evans v. Twin Falls County*, 118 Idaho 210, 214, 796 P.2d 87,91 (1990)(citing 31A Am. Jur.2d, *Expert & Opinion Evidence*, section 207) as follows:

Where the subject matter regarding the cause of disease, injury, or death of a person is wholly scientific or so far removed from the usual and ordinary experience of the average person that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease or physical condition.

Swallow, 67 P.3d at 77.

In *Swallow*, the court held that a jury of lay people was not qualified to determine the cause of the plaintiff's heart attack without the assistance of expert testimony, upon the grounds that such causation was, "a matter of science that is far removed from the usual and ordinary experience of the average person." *Id.* For guidance, the *Swallow* court examined similar results reached by the court. *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 934 P.2d 17 (1997)(holding that a lay person was not qualified to testify as to the cause of plaintiff's seizure); *Evans, supra* (holding that a lay person was not qualified to testify as to the cause of his wife's cardiac arrest); *Flowerdew v. Warner*, 90

Idaho 164, 409 P.2d 110 (1965)(holding that a lay person was not qualified to testify that his physician's treatment of him caused his injuries).

To prove causation, Plaintiffs must prove both factors that comprise proximate cause. *Marias v. Marano*, 120 Idaho 11, 13, 813 P.2d 350, 352 (1991); *Henderson v. Comminco American, Inc.*, 95 Idaho 690, 695-96, 518 P.2d 873, 878-79 (1974); *Collins v. Collins*, 130 Idaho 705, 708, 946 P.2d 1345, 1349 (Ct. App. 1997). The first factor of the proximate cause analysis is cause-in-fact (also referred to as "actual cause") and the second factor is scope of legal responsibility (also referred to as "foreseeability"). *Marias*, 120 Idaho at 13, 813 P.2d at 352; *Munson v. State Dept. of Highways*, 96 Idaho 529, 531 P.2d 1174 (1975); *Collins*, 946 P.2d at 1349.

The determination of the first factor, cause-in-fact, is a factual finding of whether Mr. Byrne's or Dr. Dillè's actions were an actual cause of Plaintiffs' harm, *Ficarro v. McCoy*, 126 Idaho 122, 126 -127, 879 P.2d 30, 34-35 (Ct. App. 1994), while the second factor, legal responsibility, is a legal determination of whether legal responsibility should attach to Mr. Byrne and Dr. Dillè as a result of their treatment of Mrs. Schmechel. *Doe v. Garcia*, 131 Idaho 578, 961 P.2d 1181 (1998).

The cause-in-fact component of proximate cause has been widely discussed in Idaho cases. See *Doe v. Sisters of Holy Cross*, 126 Idaho 1036, 1039, 895 P.2d 1229, 1233 (Ct. App. 1995). To determine whether an event is a cause-in-fact (actual cause) of injury, the Idaho Supreme Court has applied two tests. The first test is known as the "but for" test, which is applied to single causation cases. The second test, known as the "substantial factor" test, is applied in multiple causation cases. *Garcia v. Windley*, 144 Idaho 539, 543, 164 P.3d 819, 823 (2007).

In multiple causation cases where the substantial factor test is used, the jury must be instructed that proximate cause is only established in a medical malpractice action if the jury finds that the defendant physician's negligence was a "substantial factor" in causing the plaintiff's injury. *Newberry v. Martens*, 142 Idaho 284, 288, 127 P.3d 187, 191 (2005); *Fussell v. St. Clair*, 120 Idaho 591, 592, 818 P.2d 295, 296 (1991); *see also Doe v. Garcia*, 131 Idaho 578, 961 P.2d 1181, 1184-85 (Ct. App. 1998). Furthermore, the negligence of a party will not be considered the proximate cause of a plaintiff's damages if such damages would have occurred notwithstanding the negligence. Moreover, as noted above, expert testimony is required to establish causation in a medical malpractice case. Plus, to satisfy the causation element, Plaintiffs must demonstrate, through expert testimony, that any act or omission by Mr. Byrne or Dr. Dillè was a substantial factor in bringing about damages and that in the absence of such negligence, the damages would not have occurred. *Fussell*, 120 Idaho at 592, 818 P.2d at 296.

To prove proximate cause, Plaintiffs must first prove Defendants failed to meet the applicable standard of care, and that had the Defendants adhered to the applicable standard of care, the outcome for Mrs. Schmechel would have been different. Such proof must be established to a reasonable degree of medical certainty by competent expert testimony. See I.C. §§ 6-1012 and 6-1013.

D. Damages.

1. General discussion.

Neither Dr. Dillè nor Mr. Byrne were negligent and Plaintiffs will not be able to meet their burden on the above elements. Dr. Dillè provides the following analysis, however, to assist the Court in preparing jury instructions and in the event the jury

disagrees and reaches a finding of liability.

In general, plaintiffs bear the burden of proving not only a right to damages, but also the fact and amount of damages. *Hummer v. Evans*, 129 Idaho 274, 923 P.2d 981 (1996); *Beare v. Stowes Builders Supply, Inc.*, 104 Idaho 317, 658 P.2d 344 (1964). Plaintiffs must establish the amount of damages with reasonable certainty and sufficient proof must exist to take the measure of damages out of the realm of speculation. *General Auto Parts Co., Inc. v. Genuine Parts Co.*, 132 Idaho 849, 979 P.2d 1207 (1999); *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 744 P.2d 121 (Ct.App. 1987).

Plaintiffs may only recover damages resulting from wrongful death for "loss of companionship, protection, bodily care, intellectual culture, and moral training providing it sufficiently appears that pecuniary damages resulted from the loss." *Pfau v. Comair Holdings, Inc.*, 135 Idaho 152, 155, 15 P.3d 1160, 1163 (2000). It is important to consider the damages that Plaintiffs, as a matter of law, are not entitled to recover. Plaintiffs are not entitled to damages for their grief, sorrow, mental anguish and suffering as a result of Mrs. Schmechel's death. See *Checketts v. Bowman*, 70 Idaho 463, 220 P.2d 682 (1950); *Hepp v. Ader*, 64 Idaho 240, 130 P.2d 859 (1942); IDJI 911. Plaintiffs may not recover for any pain and suffering Mrs. Schmechel may have suffered prior to her death as a result of the alleged negligence of Mr. Byrne or Dr. Dillé. See *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990), *cert. denied* 111 S. Ct. 960 (1991); *Vulk v. Haley*, 112 Idaho 855, 736 P.2d 1309 (1987). In addition, Plaintiffs may not recover the loss of income Mrs. Schmechel would have earned to the extent the income would not have been required to support and maintain these Plaintiffs had

she survived. Moreover, any award the Plaintiffs may receive for loss of services and support must be reduced to their present value. See *Coeur d'Alene Garbage v. Coeur d'Alene*, 114 Idaho 588, 759 P.2d 879 (1988); *W.L. Scott, Inc., v. Madras Aerotech, Inc.*, 103 Idaho 736, 753 P.2d 791 (1982).

2. Plaintiffs' non-economic damages are limited.

Idaho Code § 6-1603 places a limitation on the recovery of non-economic damages in personal injury and wrongful death actions. Thus, under this section, Plaintiffs may not recover more than \$250,000 per Plaintiff (plus an adjustment as set forth in the statute) for any non-economic damages they may have sustained.

3. Plaintiffs' economic damages - Loss of support, if any, must be based on net earnings not pretax earnings.

Damages allowed in a wrongful death action are designed to provide for the economic support of the survivors of the victim. In a wrongful death action, an award for loss of economic support is designed to reflect economic reality in that the survivors must be supported to the same degree they would have been supported but for the absence of the victim. However, the award is not to be inflated, and the evidence her shows Mrs. Schmechel offered Plaintiffs little, if any, economic support.

In fact, the Plaintiffs are unable to prove the amount of work Mrs. Schmechel performed for the family business or that she was ever paid any wages for the work she allegedly performed for the business. To recover damages for loss of earnings and support, Plaintiffs must establish not only the amount of damages with reasonable certainty, but they must also provide sufficient proof to remove the measure of damages from the realm of speculation. *Moeller v. Harshbarger*, 118 Idaho 92, 93, 794 P.2d 1148, 1149 (Ct. App. 1990) ("Damages for lost earnings must be shown with reasonable

certainty; compensatory awards based upon speculation and conjecture will not be allowed."). Therefore, without proof of the actual amount of lost wages or value of support provided by Mrs. Schmechel, Plaintiffs should not recover for any lost support.

If the Court allows the jury to consider such evidence, however, it should provide detailed instruction on this issue. The Idaho model jury instructions provide for an instruction that an award in a wrongful death action is not subject to income tax and that the jury is not to consider tax consequences when calculating an award. IDJI.2d 9.05 The purpose of Instruction 9.05 is to protect a defendant from an inflated judgment; the possibility that the jury may inflate an award erroneously assuming that the whole award would be subject to income tax in that given year. This same approach has been adopted by the United States Supreme Court in federal wrongful death cases. *Norfolk & W. Ry. Co. v. Leipelt*, 444 U.S. 490, 100 S. Ct. 577 (1980). In *Norfolk*, the Court held that tax information must be given to the jury in a jury instruction in order to prevent inflated judgments. *Id.*

However, in *Norfolk*, the Supreme Court went one step further and held that a judgment in a wrongful death action must be reduced to the income that would have been earned after taxes; net income. *Id.* The Supreme Court held the purpose of the rule was to allow recovery for earning the victim would have made in light of the economic reality of paying taxes but for the accident. *Id.* Although Idaho has adopted IDJI.2d 9.05 and provided some protection against inflated judgments, Idaho courts, like the United States Supreme Court, must limit an award in a wrongful death action for lost wages or support to the net income the deceased would have earned but for the negligence. In a wrongful death action, damages for economic support reflect the

victim's potential wages earned. Thus, any award for lost wages based upon gross income or pretax income incorrectly requires a defendant to pay a judgment that, even if the victim had lived would not have been used to support the survivors. Thus, in order to reflect economic reality, an award for loss of economic support or lost wages in a wrongful death action must be limited to net earnings—if any lost economic support can be established at all.

IV. OTHER ISSUES

A. The Doctrine of Comparative Fault May Limit Defendants' Liability.

Because Plaintiffs' claim is founded in negligence, and because the claim arose after the Idaho Legislature's abolition of joint and several liability, Defendants' liability in this case is limited to their own proportion of fault, as determined by the jury. Idaho Code § 6-803 governs the extent of liability of a defendant. That section provides, in pertinent part:

The common law doctrine of joint and several liability is hereby limited to causes of action listed in subsections (5), (6) and (7) of this section. In any action in which the trier of fact attributes the percentage of negligence or comparative responsibility to persons listed on a special verdict, the court shall enter a separate judgment against each party whose negligence or comparative responsibility exceeds the negligence or comparative responsibility attributed to the person recovering. The negligence or comparative responsibility of each such person is to be compared individually to the negligence or comparative responsibility of the person recovering. Judgment against such party shall be entered in an amount equal to each party's proportionate share of the total damages awarded.

Furthermore, under Idaho Code § 6-802, the trial court is required, when requested by any party, to "direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence or comparative responsibility attributable to each party" I.C. § 6-802. Under this section, the Court must submit

a special verdict form with the names of every person who may have contributed to Mrs. Schmechel's death, regardless of whether those persons are parties to the action. *Pocatello Industrial Park Co. v. Steel West, Inc.* 101 Idaho 783, 621 P.2d 399 (1980). In addition, any negligence attributable to Mrs. Schmechel, must be imputed to the Plaintiffs. *Bevan v. Vassar Farms, Inc.* 117 Idaho 1038, 793 P.2d 711 (1990): I.C. § 6-801. Mrs. Schmechel should be placed on the verdict form if the evidence demonstrates that she was negligent. Thus, for example, if the evidence show that she failed to seek medical treatment when necessary given her overall health condition and symptoms, then the jury may be entitled to consider her comparative fault, or the fault of the other Plaintiffs. Likewise, is she failed to follow the instructions of the health care providers she may be comparatively negligent. However, the issue of comparative fault of Mrs. Schmechel or the other Plaintiffs will depend on the state of the evidence at the close of the case.

B. Medical Treatises and Literature are Not Admissible as Exhibits.

Plaintiffs may attempt to offer medical articles, journals or books into evidence at trial. Such articles are hearsay, and the applicable exception to the hearsay rule does not allow these materials to be admitted into evidence, Idaho Rule of Evidence 801, identical to Federal Rule of Evidence 801, defines hearsay as: "[a] statement other than one made by the claimant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Treatises fit within this hearsay definition. See e.g., *Dartez v. Fireboard Corp.*, 765 F.2d 456 (5th Cir. 1985); *Tucker v. Union Oil of California*, 100 Idaho 590, 603 P.2d 156 (1979).

The applicable exemption to the hearsay rule is Idaho Rule of Evidence 803(18), which provides:

Learned Treatises. To the extent called to the attention to the expert witness upon cross-examination or relied upon by him in direct examination, statements contained in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine, or other science or arts, established as a reliable authority by testimony or admission of the witness by other expert testimony or by judicial notice. If admitted, the statement may be read into evidence but may not be received as exhibits.

I.R.E. 803(18) (emphasis added.)

The rule does not allow treatises to be physically admitted into evidence because the jury might misinterpret or misapply them.

When commenting on the dangers of juror misinterpreting or misunderstanding treatises, drafters of the identical federal rule commented:

The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which the expert is on the stand and is available to explain and assist in the application of the treatises declared. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

See, Comments, F.R.E. 803; *Dartez v. Fireboard Corp.* 765 F. 2d at 465.

In this case, the danger is high that the jury could misunderstand or misapply complex medical treatises or literature which Plaintiffs may attempt to introduce into evidence. The physicians who will be interpreting and applying the treatises to the facts of this case spent years in medical school and in practice learning how to interpret and apply the treatises. The jurors cannot be expected to realize the strengths and weaknesses of the author's conclusions with the brief education which the experts will provide. Plaintiffs cannot show any overriding necessity for admitting the treatises as exhibits and therefore they should not be admitted into evidence, unless another exception to the hearsay rule applies.

C. Where a Statute Expresses the Law Governing the Case the Court Should Instruct the Jury Using the Language of the Statute.

As a general rule, where the law governing a case is expressed in a statute, the court in its instruction should use the language of the statute, and may commit error if it employs language which constitutes a departure from the statute. In *State v. Rutten*, 73 Idaho 25, 31 P.2d 778, 782 (1952), the Idaho Supreme Court held, "[A]s a general rule where the law governing a case is expressed in a statute, the court in its charge not only may, but should, use the language of the statute, . . ." (quoting 53 Am. Jur. *Trial* ¶ 542 at 433); see also, *Ledford v. Fisher*, 439 S.W.2d 781 (Tenn. 1969); *Jorgenson v. Dronebarger*, 143 N.W.2d 869 (S.D. 1966); *State v. Bixby*, 177 P.2d 689, 703 (Wash. 1947)(holding that a court may be guilty of error if it employs language which constitutes departure from statute).

Likewise, in *Holland v. Peterson*, 95 Idaho 728, 518 P.2d 1190 (1974), the Idaho Supreme Court held that it was proper for the trial court to give the jury "verbatim" the provisions of a governing statute. 95 Idaho at 731, 518 P.2d at 1193; see also, *Mendenhall v. MacGregor Triangle Co.*, 83 Idaho 145, 149, 358 P.2d 860, 862 (1961)(reading to jury language of statute constituted proper instruction); *Dawson v. Salt Lake Hardware Co.*, 64 Idaho 666, 674, 136 P.2d 733, 736 (1943)(holding that a court properly instructed jury using language of statute.) The public policy behind the rule is clear:

Ordinarily, the language employed by the legislature in defining a crime is deemed to be best suited for that purpose, and error cannot be predicated upon its use in information and instructions.

State v. Aragon, 107 Idaho 358, 362, 690 P.2d (1984)(quoting *State v. Brooks*, 49 Idaho 404, 409, 288 p. 894 (1930)).

In the present case, Idaho Code section 6-1012 contains the language employed by the Idaho legislature defining the standard of proof necessary in an action brought against a health care provider in a malpractice case, and this language is deemed to be best suited for that purpose. Accordingly, it is not surprising that the Idaho Supreme Court in *Robertson v. Richards*, 115 Idaho 628, 769 P.2d 505 (1987) *on rehearing* (1989), ruled that instructions embodying the precise language contained in Idaho Code sections 6-1012 & 6-1013 were the appropriate instructions to use at trial. *Id.*, 115 Idaho at 633, 657.

In light of the enactment of Idaho Code §§ 6-1012 and 6-1013, IDJI 2.10.1 and 2.10.2 dealing with the standard of care for a specialist health care professional and non specialist health care professional are improper. The instructions purport to define, in general terms, a physician's duty of care. However, under Idaho Code Section 6-1013, the applicable standard of care in the defendant's community is to be established by the plaintiff through expert testimony in each case.

Moreover, IDJI 2.10.1 and 2.10.2 omit any reference to the standard of care as it existed at the time of the occurrence. Such a reference is important, especially since the incident in the case at bar occurred three nearly four years ago and Plaintiffs own experts have indicated that there have been subsequent changes in the standard of care. *See, Gubler v. Boe*, 120 Idaho 294, 815 P.2d 1034 (1991). Accordingly, it would be error for this Court not to instruct the jury using the express language of Idaho Code §§ 6-1012 and 6-1013.

D. Plaintiffs Should Be Precluded From Attempting To Use Any Evidence That Was Specifically Requested In Discovery, But Not Produced.

If a party specifically requests materials possessed by an adverse party, the material must be produced, even if the adverse party only intends to use the material for impeachment purposes. *Varga v. Rockwell Intern. Corp.*, 242 F.3d 693, 697 (6th Cir. 2001); *cert. denied* 122 S.Ct. 53, 534 U.S. 821, 151 L.Ed.2d 23; *see also*, *Mason v. Stanley*, 229 F.R.D. 533 (S.D. Miss. 2005); 8 WRIGHT & MILLER, *Federal Practice and Procedure: Civil 2d* § 2015 (2007) ("The fact that the party responding to discovery intends to use the material only for impeachment does not take it out of the realm of discoverable material if it is otherwise relevant."). In *Varga*, the Sixth Circuit stated in no uncertain terms:

The plaintiffs argue in this appeal that they were unfairly prejudiced by Rockwell's failure to produce these documents before trial, and the district court's decision to allow Rockwell to use the exhibits at trial is reversible error. Rockwell counters that it had no obligation to produce the documents because it viewed them as usable solely for impeachment purposes. As we shall explain below, plaintiffs' claim of error is meritless. But we will first address Rockwell's argument, which is so devoid of merit as to be specious.

The Federal Rules of Civil Procedure allow litigating parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." FED.R.CIV.P. 26(b)(1). The rules are broad, and litigants are required to comply with all properly propounded document requests. FED.R.CIV.P. 34. While it is arguable that Lemanski's lists were not identified at Brown's deposition, Trial Exhibits 69 and 70 clearly fall within the plaintiffs' original document request, and Rockwell was obligated to produce them.

* * *

At oral argument, counsel for Rockwell was asked to explain the absence of cases supporting his rule that a party served with specific discovery requests may withhold otherwise relevant evidence if that party unilaterally concludes that the only useful purpose for the evidence at trial is impeachment. Counsel responded that the lack of published cases suggests that Rockwell's rule is one that is universally accepted among all

was given by defendant's counsel but only because the defendant's argument was moderate in nature and was directed toward the reasonableness of a party's action.

The Court held:

[T]he "golden rule" argument is only appropriate when used to ask the jury to assess the reasonableness of a party's actions by relying upon their own common sense and life experiences. The "golden rule" argument is never appropriate when used to influence the damage award. Our holding is in accord with the majority of courts which have decided this issue.

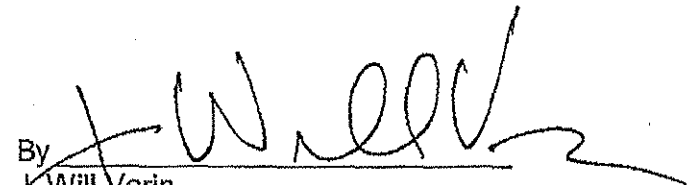
The "golden rule" argument is uniformly prohibited where it is used to inflame the jury and encourage an increased damage award. Typically, in such situations, the plaintiff's attorney will ask the jury members to place themselves "in the shoes of the plaintiff" by asking them to question themselves as to how much they would wish to be paid to endure the damage plaintiff had suffered. Such argument is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the merits of personal interest and bias rather than on the evidence. *Lopez*, 114 Idaho at 878-79, 761 P.2d at 1231. Thus, the use of any "golden rule" argument to influence damages by Plaintiffs' counsel in this case would be improper and grounds for a mistrial.

V. CONCLUSION

The evidence in this case will show that the Defendants' care and treatment of Mrs. Schmechel was not only within the applicable standard of care, but, rather, was excellent. Furthermore, the evidence will show nothing the Defendants did or did not do in any way contributed to Mrs. Schmechel's death. Moreover, other factors contributed to Mr. Schmechel's death, and Defendants should not be required to compensate the Plaintiffs for factors beyond their control.

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DATED this 10th day of October 2007.

GIVENS PURSLEY, LLP

By 
J. Will Varin
Attorneys for Defendant
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CERTIFICATE OF SERVICE

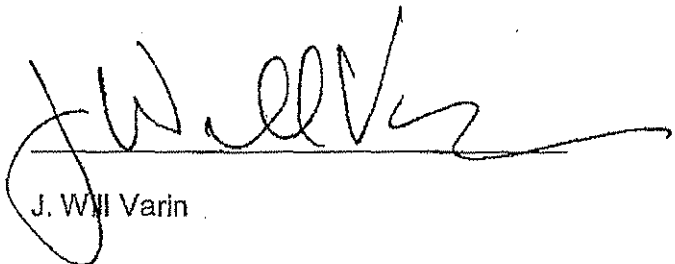
I hereby certify that on this 10th day of October 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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